

*Library
of
The Secretary to the President
of India*



सत्यमेव जयते

Reference No.
341.5 (42)
Sc 53 T

*Rashtrapati Bhavan,
New Delhi.*

Class No.....

[illegible]

A TEXTBOOK OF THE
ENGLISH CONFLICT OF LAWS

BY THE SAME AUTHOR

THE EXPORT TRADE, A Manual of Law and Practice;
Stevens and Sons, Ltd., 1948.

A TEXTBOOK
of the
ENGLISH CONFLICT OF LAWS
(PRIVATE INTERNATIONAL LAW)

By
CLIVE M. SCHMITTHOFF
LL.M.(Lond.), LL.D.(Berl.)
OF GRAY'S INN, BARRISTER-AT-LAW

WITH A FOREWORD BY
THE RT. HON. LORD MACMILLAN, G.C.V.O.

SECOND EDITION



LONDON
SIR ISAAC PITMAN & SONS, LTD.
1948

First Edition . . . 1946
Second Edition . . . 1948

SIR ISAAC PITMAN & SONS, LTD.
PITMAN HOUSE, PARKER STREET, KINGSWAY, LONDON, W.C.2
THE PITMAN PRESS, BATH
PITMAN HOUSE, LITTLE COLLINS STREET, MELBOURNE
27 BECKETTS BUILDINGS, PRESIDENT STREET, JOHANNESBURG

ASSOCIATED COMPANIES
PITMAN PUBLISHING CORPORATION
2 WEST 45TH STREET, NEW YORK
205 WEST MONROE STREET, CHICAGO

SIR ISAAC PITMAN & SONS (CANADA), LTD.
(INCORPORATING THE COMMERCIAL TEXT BOOK COMPANY)
PITMAN HOUSE, 381-383 CHURCH STREET, TORONTO



THIS BOOK IS PRODUCED IN
COMPLETE CONFORMITY WITH THE
AUTHORIZED ECONOMY STANDARDS

FOREWORD

IN articles contributed to the Journal of Comparative Legislation and International Law the author of this treatise has already given proof of his learning and of his ability to deal with particular problems in the conflict of laws. In the present volume he essays a larger task and has shown himself no less competent to provide a systematic survey of the whole field of his chosen subject. Legal textbooks are in general intended for consultation rather than for continuous perusal and their merit is commonly gauged by their utility to the practitioner in search of assistance on some point arising in his daily work, but having read through in typescript the whole of Dr. Schmitthoff's book I can testify that it is not only an excellent work of reference but also a remarkably complete exposition within moderate compass of the whole range of the difficult branch of law with which it deals.

Few topics are more attractive to the student of legal principles than that which in England is known as the conflict of laws. Probably few have been more controversial and the conflict of laws has not infrequently evoked a conflict of lawyers. Even the proper designation of the subject has been much disputed and in some quarters the titles "private international law" or "international private law" still persist, though frowned upon by Dr. Schmitthoff. In the epic contest between the English and the Scottish Courts in the case of *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453, Lord Selborne said at p. 513: "The phrase 'private international law' is liable to be misunderstood. It is a convenient expression for such rules as in the jurisprudence of most civilised nations are applied *ex comitate* to the solution of questions depending upon foreign status, foreign laws or foreign contracts." But this generalisation would not pass unchallenged by Dr. Schmitthoff who finds no satisfaction in Huber's doctrine of comity (with its correlative of reciprocity). The "statute" theory he equally finds outmoded. But I do not think he would subscribe to the view expressed by the learned lecturer on International Private Law in Edinburgh University when he says that "the courts now no longer require to search for some philosophical or theoretical reason for the recognition and application of one legal system by the courts of another. Social and more particularly economic intercourse between the different nationals has made such recognition and application a practical necessity." Dr. Schmitthoff rightly regards it as conducive to clear thinking and to just decision in matters involving a conflict

of laws to have a sound basis in principle. In his own opening chapters he describes and analyses the rival theories which have prevailed at different periods in the history of the subject and ultimately decides in favour of the doctrine of the "vested right" which he persuasively expounds. He does not, however, linger too long in these preliminary approaches or lose his way among the metaphysical subtleties by which the student of this branch of the law may so easily be beguiled. When he settles down to the actual law, as we have in case and statute, he shows himself eminently practical and to the point. Where the law is ascertained he states it clearly; where there is still a penumbra of doubt he furnishes useful guiding lights and does not hesitate to offer his own conclusions.

Modern writers of fiction, mindful of *Hutton v. Jones*, are careful to assure us that the characters in their novels have no relation to any actual persons. When a judge writes a foreword to a lawbook it would perhaps be equally wise for him to say that he does not commit himself to any of the propositions of law which it contains, lest he find himself confronted with them elsewhere. But I can at least safely say that I have found the reading of this book an excellent "refresher course" in the conflict of law and that I commend it as a convenient work for the practitioner to consult and, perhaps especially, as an admirable manual for law students.

MACMILLAN.

PREFACE TO THE SECOND EDITION

IN the Second Edition, I have not changed the balance between the theoretical and practical parts of the book. The result of modern research has been noted, more than 50 additional cases have been treated and new legislation, so far as relevant, has been considered. Some of the decisions reported in the two years which have passed since the publication of the First Edition have required detailed treatment, but by condensing certain passages of the First Edition, e.g. those dealing with domicile in oriental countries and Indian and Colonial divorces, I have been able to avoid a substantial increase in the size of the Second Edition which exceeds the First Edition only by six pages. The work entailed in this process of adjustment was considerable.

My thanks are due to two friends who helped me in the preparation of the First Edition, namely Mr. Charles Winter, LL.M., Barrister-at-Law, of the Legal and Parliamentary Department of the London County Council, and Mr. A. Carreras, LL.B. (Hons. Lond.), Barrister-at-Law. They read the proofs and gave me the benefit of their advice on doubtful questions. In this, as in the First Edition, I have endeavoured to maintain a high standard of accuracy in references and quotations.

C. M. S.

GOLDSMITH BUILDING,
TEMPLE,
LONDON, E.C.4.

PREFACE TO THE FIRST EDITION

THIS attempt to present the rules of the English conflict of laws to the student and the practitioner in a concise manner was completed when the storm of the Second World War broke loose. That event made it advisable to postpone publication, in particular as I joined the Army in September 1940. In the subsequent years, I spent many hours, when on leave, in the battered libraries of the Temple in order to keep my manuscript up to date. At the beginning of 1944, I seized an opportunity to read the proofs and make the final corrections.

I was privileged to receive the support of a number of friends whose encouragement and assistance I gratefully acknowledge.

Professor D. Hughes Parry, of the University of London, gave valuable advice on the general arrangement of the treatise and perused the greater part of the typescript. His comments encouraged me to continue and conclude the work which I had undertaken. My particular thanks are due to Prof. D. J. Llewlyn Davies, of the University College of Wales, Aberystwyth, and Mr. Charles Winter, LL.M., Barrister-at-Law, of the Legal and Parliamentary Department of the London County Council. Mr. Davies read the entire typescript, and made a number of suggestions which were highly appreciated. Mr. Winter revised the typescript with great care and discussed a number of intricate questions with me. Many passages owe their final form to his scholarship and precision. Mr. A. Carreras, LL.B. (Hons. Lond.), of Lincoln's Inn, Barrister-at-Law, gave valuable assistance in the preparation of the book for press; his erudite observations were very helpful and his solicitude was untiring to secure a high standard of accuracy in the references to case law and statutes.

C. M. S.

GOLDSMITH BUILDING,
TEMPLE,
LONDON, E.C.4.

CONTENTS

	PAGE
FOREWORD	v
PREFACE TO THE SECOND EDITION	vii
PREFACE TO THE FIRST EDITION	vii
TABLE OF STATUTES	xxiii
TABLES OF RULES AND ORDERS	xxviii
TABLE OF CASES	xxx
ABBREVIATIONS	xlix

PART I: INTRODUCTION

CHAPTER I

SUBJECT-MATTER OF THE CONFLICT OF LAWS	I
I. THE CONFLICT OF LAWS ARISES FROM THE EXISTENCE OF DIFFERENT LEGAL UNITS	I
1. WHAT IS A LEGAL UNIT?	I
2. THE CONFLICT OF LAWS (PRIVATE INTERNATIONAL LAW) AND THE LAW OF NATIONS (PUBLIC INTERNATIONAL LAW)	2
3. THE PROVINCE OF THE CONFLICT OF LAWS	3
II. DEFINITION OF THE CONFLICT OF LAWS	4
1. THE CONFLICT OF LAWS IS PART OF THE MUNICIPAL LAW	4
2. THE CONFLICT OF LAWS IS CONCERNED WITH DISPUTES EXTENDING OVER SEVERAL LEGAL UNITS	5
3. THE CONFLICT OF LAWS DETERMINES THE LAW APPLIC- ABLE TO THE ISSUE AND THE JURISDICTION OF THE COURTS	6
III. NATURE OF THE CONFLICT OF LAWS	8

CHAPTER II

HISTORY AND MODERN DOCTRINES OF THE CONFLICT OF LAWS	12
I. FROM ANCIENT ROME TO THE DUTCH SCHOOL	12
1. ANCIENT ROME	12
2. THE PERSONAL LAW OF THE GERMAN TRIBES	13
3. THE TERRITORIAL LAW OF FEUDALISM	14
4. THE ITALIAN STATUTISTS: BARTOLUS	14
5. THE FRENCH SCHOOL: DUMOULIN AND D'ARGENTRÉ	16
6. THE DUTCH SCHOOL: VOET AND HUBER	17
II. HISTORY OF THE CONFLICT OF LAWS IN ANGLO-AMERICAN LAW	20
I. BEFORE THE UNION WITH SCOTLAND	20
A. ENGLISH AND NORMAN LAW	20
B. CANON AND COMMON LAW	20
C. EARLY MERCANTILE LAW	21

	PAGE
2. SINCE THE UNION WITH SCOTLAND	22
A. CALVIN'S CASE	22
B. ENGLISH CASE LAW OF THE EIGHTEENTH CENTURY	23
C. JOSEPH STORY	24
III. MODERN DOCTRINES OF THE CONFLICT OF LAWS	25
1. THE DIFFERENT DOCTRINES	25
A. THE INTERNATIONALISTS	25
B. THE NEO-STATUTISTS	26
C. THE TERRITORIALISTS	27
2. CRITICISM	27
A. THE INTERNATIONALISTS	28
B. THE NEO-STATUTISTS	28
C. THE TERRITORIALISTS	29

CHAPTER III

THE VESTED RIGHT	31
I. THE DEFINITION OF THE RIGHT. CLASSIFICATION AND CHARACTERISATION	33
1. THE FOREIGN DOCTRINES	33
2. THE ENGLISH DOCTRINE	34
3. ILLUSTRATIONS	35
A. MONOGAMOUS AND POLYGAMOUS MARRIAGES	35
(a) THE CLASSIFICATION THEREOF	36
(b) THE CHARACTERISATION THEREOF	36
B. MOVABLES AND IMMOVABLES	38
(a) THE CLASSIFICATION THEREOF	38
(b) THE CHARACTERISATION THEREOF	40
C. CORPORATIONS AND PARTNERSHIPS	42
D. FURTHER ILLUSTRATIONS	43
II. THE CONNECTION OF THE RIGHT	44
1. GENERAL OBSERVATIONS	44
2. DOMICIL AS A PROBLEM OF CONNECTION	46
3. CAPACITY AS A PROBLEM OF CONNECTION	46
III. EXCEPTIONS TO THE RULE OF THE PROTECTION OF VESTED RIGHTS	49
1. FOREIGN RIGHTS AFFECTED BY AN IMPERIAL STATUTE	51
2. FOREIGN RIGHTS NOT ADMITTED BY COMMON LAW	52
A. FOREIGN RIGHTS OF A SUBSTANTIALLY POLITICAL CHARACTER	52
(a) THE REVENUE CASES	53
(b) THE PENAL LAW CASES	54
(c) THE CONFISCATION OF PROPERTY CASES	55
(d) THE REQUISITION OF PROPERTY CASES	59

B. FOREIGN RIGHTS REPUGNANT TO ENGLISH SOCIAL INSTITUTIONS	60
(a) FOREIGN RIGHTS CONTRARY TO ENGLISH PUBLIC POLICY	60
(b) OTHER CASES	61
(i) THE LAW OF TORTS	62
(ii) FOREIGN JUDGMENTS	62
(iii) DISCRIMINATION FOR REASONS OF COLOUR, RACE, ETC.	63

CHAPTER IV

THE LAW OF DOMICIL	65
I. DOMICIL—A PROBLEM OF CONNECTION	65
1. DOMICIL AND NATIONALITY	65
2. DOMICIL AS A MEANS OF CONNECTION	66
3. SUPERIORITY OF THE TEST OF DOMICIL OVER THAT OF NATIONALITY	67
II. DEFINITION OF DOMICIL	68
III. THE PRINCIPLES OF THE LAW OF DOMICIL	70
1. EVERY PERSON MUST HAVE A DOMICIL	70
2. NO PERSON CAN HAVE MORE THAN ONE DOMICIL	72
3. THE <i>LEX FORI</i> DEFINES DOMICIL	73
4. SUMMARY OF THE PRINCIPLES OF THE LAW OF DOMICIL	73
IV. THE DIFFERENT KINDS OF DOMICIL	74
1. DOMICIL OF ORIGIN	74
2. DOMICIL OF CHOICE	75
A. GENERAL OBSERVATIONS ON ACQUISITION, ABANDONMENT AND RETENTION OF DOMICIL	75
B. ASCERTAINMENT OF THE INTENTION OF THE <i>DE CUIUS</i> TO ACQUIRE OR ABANDON A DOMICIL	77
C. NO OTHER ELEMENTS THAN RESIDENCE AND INTENTION ARE REQUIRED	83
3. DOMICIL OF DEPENDENT PERSONS	85
A. MARRIED WOMEN	85
B. MINORS	86
C. PERSONS OF UNSOUND MIND	88
V. <i>RENVOI</i>	89
1. IN THE ENGLISH DOCTRINE, THE "LAW OF DOMICIL" INCLUDES THE FOREIGN CONFLICT OF LAWS	90
2. CONSEQUENCES FLOWING FROM THE ENGLISH DOCTRINE	91
3. THE AMERICAN DOCTRINE	92
4. <i>RENVOI</i> IN THE ENGLISH CONFLICT OF LAWS	92
5. WHERE <i>RENVOI</i> BREAKS DOWN	95
6. CRITICAL REVIEW OF THE ENGLISH DOCTRINE	96

PART II: THE CHOICE OF LAW

Division I: The Law of Contract and Torts

CHAPTER V

	PAGE
THE LAW OF CONTRACT	98
I. THE DOCTRINE OF THE PROPER LAW	98
1. INTRODUCTION	98
A. LIBERTY OF CONTRACTING IN ENGLISH LAW	98
B. CONNECTION WITH THE DOCTRINE OF THE PROPER LAW	99
2. THE PRESENT POSITION	100
A. STATEMENT OF THE DOCTRINE OF THE PROPER LAW	100
B. THE EXPRESS INTENTION OF THE PARTIES	101
C. THE PRESUMED INTENTION OF THE PARTIES	101
D. UNIVERSALITY OF THE DOCTRINE OF THE PROPER LAW	104
E. MULTIPLICITY OF THE PROPER LAW	106
3. LIMITATIONS OF THE DOCTRINE OF THE PROPER LAW	108
II. APPLICATION OF THE DOCTRINE OF THE PROPER LAW TO THE INCIDENTS OF CONTRACT	III
1. CAPACITY	II2
2. FORM	II2
A. GENERAL OBSERVATIONS	II2
B. CONSIDERATION	II5
C. STAMP LAWS	II6
3. ESSENTIAL VALIDITY	II7
A. GENERAL OBSERVATIONS	II7
B. PRESUMPTION IN FAVOUR OF <i>LEX LOCI CONTRACTUS</i>	II9
C. PRESUMPTION IN FAVOUR OF <i>LEX SOLUTIONIS</i>	II9
D. OTHER CASES	I21
4. ILLEGALITY	I22
A. WHERE THE CONTRACT IS ILLEGAL ACCORDING TO THE PROPER LAW	I22
B. WHERE THE CONTRACT IS ILLEGAL ACCORDING TO THE <i>LEX LOCI SOLUTIONIS</i>	I23
C. WHERE THE CONTRACT IS ILLEGAL ACCORDING TO THE <i>LEX LOCI CONTRACTUS</i>	I24
D. WHERE THE CONTRACT IS ILLEGAL ACCORDING TO THE <i>LEX FORI</i>	I25
III. PARTICULAR CONTRACTS	I25
1. MARITIME CONTRACTS	I26
2. CONTRACTS RELATING TO LAND	I27
3. MARRIAGE SETTLEMENTS	I30

CONTENTS

xiii

	PAGE
IV. NEGOTIABLE INSTRUMENTS	132
I. THE GENERAL POSITION	132
A. NEGOTIABILITY—A PROBLEM OF CLASSIFICATION	132
B. THE IMPORTANCE OF THE BILLS OF EXCHANGE ACT, 1882	133
2. THE PROVISIONS OF THE BILLS OF EXCHANGE ACT, 1882	134
A. THE TEXT OF THE ACT	134
B. DEFINITIONS	135
C. FORM	136
D. ESSENTIAL VALIDITY	137
E. PERFORMANCE	140

CHAPTER VI

THE LAW OF TORTS	144
I. DIFFERENT THEORIES ON TORTIOUS LIABILITY	144
1. THE <i>LEX LOCI DELICTI</i> THEORY	144
2. THE OBLIGATION THEORY	145
3. THE <i>LEX FORI</i> THEORY	146
4. THE ENGLISH DOCTRINE	147
II. THE ENGLISH CASES	148
1. "NOT JUSTIFIABLE" ACCORDING TO THE <i>LEX LOCI DELICTI</i>	149
A. NO LIABILITY	149
B. VALID LEGAL DEFENCE	150
C. LEGALISATION	153
2. "ACTIONABLE" ACCORDING TO ENGLISH LAW	153
A. NO LIABILITY	153
B. VALID LEGAL DEFENCE	154
C. LEGALISATION	154
3. CONCLUSION	154
III. MARITIME TORTS	155
1. TORTS COMMITTED IN TERRITORIAL WATERS	156
2. TORTS COMMITTED ON THE HIGH SEAS	157
A. TORTS COMMITTED ON THE HIGH SEAS ON BOARD SHIP	157
B. TORTS COMMITTED ON THE HIGH SEAS AGAINST AN EXTERNAL OBJECT	157
3. THE STATUTORY LIMITATIONS OF LIABILITY IN CASE OF MARITIME TORTS	159

Division II: The Law of Property

CHAPTER VII

	PAGE
THE LAW OF IMMOVABLES	160
I. GENERAL PRINCIPLES	160
1. THE <i>LEX SITUS</i>	160
2. DEFINITION, LIMITATION AND SCOPE OF THE <i>LEX SITUS</i>	162
A. THE CLASSIFICATION INTO IMMOVABLES AND MOVABLES	162
B. QUALIFICATIONS OF THE <i>LEX SITUS</i>	162
(a) IN CASE OF JURISDICTION <i>IN PERSONAM</i>	162
(b) IN CASE OF ADMIRALTY JURISDICTION	163
C. THE APPLICATION OF THE <i>LEX SITUS</i> TO CHOICE OF LAW AND JURISDICTION	164
II. APPLICATION OF THE PRINCIPLE OF THE <i>LEX SITUS</i> TO THE CONVEYANCE	167
1. CAPACITY TO CONVEY LAND	167
2. FORM OF THE CONVEYANCE	168
3. ESSENTIAL VALIDITY OF THE CONVEYANCE	169
4. PRESCRIPTION	171
III. JURISDICTION OF THE ENGLISH COURTS <i>IN PERSONAM</i>	172
1. REQUIREMENTS OF THE JURISDICTION OF THE ENGLISH COURTS <i>IN PERSONAM</i>	173
A. THE DEFENDANT MUST BE AMENABLE TO THE ORDINARY JURISDICTION OF THE ENGLISH COURTS	173
B. A PERSONAL RELATIONSHIP MUST EXIST BETWEEN THE PARTIES	173
C. THE PRIVACY OF SUCH PERSONAL RELATIONSHIP MUST RUN FROM THE DEFENDANT TO THE PLAINTIFF	174
D. THE DECREE OF THE ENGLISH COURTS HAS NO EXTRA-TERRITORIAL EFFECT	176
2. EXAMPLES OF THE JURISDICTION <i>IN PERSONAM</i>	177
A. CONTRACTS RELATING TO IMMOVABLES	177
B. FRAUD RELATING TO IMMOVABLES	179
C. TRUSTS RELATING TO IMMOVABLES	179

CHAPTER VIII

THE LAW OF MOVABLES	181
I. DIFFERENT THEORIES AS TO THE LAW GOVERNING THE TRANSFER OF MOVABLES	182
1. <i>MOBILIA SEQUUNTUR PERSONAM</i>	183
2. THE <i>LEX ACTUS</i>	184
3. THE <i>LEX SITUS</i>	187

CONTENTS

XV

	PAGE
II. THE ENGLISH DOCTRINE	188
I. ON PRINCIPLE, THE <i>LEX SITUS</i> GOVERNS THE TRANSFER OF MOVABLES	188
A. STATEMENT OF THE PRINCIPLE	188
B. COGNATE CASES	190
(a) WHETHER A GIFT OF MOVABLES IS A GIFT <i>INTER</i> <i>VIVOS</i> OR <i>MORTIS CAUSA</i>	190
(b) WHETHER MOVABLES ARE SUBJECT TO FOREIGN CONFISCATION OR REQUISITION DECREES	190
2. EXCEPTIONS	191
A. IN ISSUES BETWEEN THE PARTIES TO THE TRANSFER (<i>INTER SE</i> RELATIONSHIP)	191
B. IN CASE OF UNCONSCIONABLE CONDUCT.	192
C. IN CASE OF THE <i>RES IN TRANSITU</i>	193
III. PARTICULAR KINDS OF TITLE TO MOVABLES	194
1. THE DERIVED TITLE	194
2. THE MORTGAGEE'S TITLE	195
3. DOCUMENTS OF TITLE TO GOODS	196

CHAPTER IX

THE LAW OF CHOSSES IN ACTION (INTANGIBLE MOVABLES)	198
I. GENERAL PRINCIPLES	198
1. WHAT IS A CHOSE IN ACTION ?	198
2. THE DIFFERENT PROBLEMS	200
3. THE DIFFERENT THEORIES	201
A. THE <i>MOBILIA SEQUUNTUR PERSONAM</i> THEORY	201
B. THE <i>LEX ACTUS</i> THEORY	202
C. THE THEORY IN FAVOUR OF THE LAW OF THE ORIGINAL CONTRACT.	204
D. THE <i>LEX SITUS</i> THEORY	204
II. THE ENGLISH DOCTRINE	205
1. THE ENGLISH RULES STATED	205
2. IN PRINCIPLE, THE ASSIGNMENT IS GOVERNED BY THE <i>LEX SITUS</i> OF THE CHOSE IN ACTION	206
3. EXCEPTIONS	210
A. AS BETWEEN ASSIGNOR AND ASSIGNEE (<i>INTER</i> <i>SE</i> RELATIONSHIP)	210
B. AS BETWEEN ASSIGNEE AND ORIGINAL DEBTOR	212

CHAPTER X

THE LAW OF GENERAL ASSIGNMENTS	214
I. INTRODUCTION	214
1. WHAT IS A GENERAL ASSIGNMENT ?	214
2. GENERAL PRINCIPLES	214

	PAGE
II. ASSIGNMENT ON DEATH.	216
I. ADMINISTRATION AND DISTRIBUTION.	218
2. ADMINISTRATION	218
A. JURISDICTION TO GRANT PROBATE OR LETTERS OF ADMINISTRATION	218
(a) ORIGINAL JURISDICTION	218
(b) ASSUMED JURISDICTION	219
(c) FOREIGN GRANTS	219
B. THE PERSONAL REPRESENTATIVE	220
C. THE ADMINISTRATION	223
3. DISTRIBUTION.	226
A. SUCCESSION TO MOVABLES	226
(a) <i>AB INTESATO</i>	227
(b) IN CASE OF A WILL	227
(i) CAPACITY TO MAKE A WILL OR TO TAKE UNDER IT	228
(ii) FORMAL VALIDITY OF THE WILL	228
(α) THE COMMON LAW RULE	229
(β) LORD KINGSDOWN'S ACT SS. I AND 2	230
(γ) SUMMARY.	232
(iii) ESSENTIAL VALIDITY	232
(α) RESTRAINTS ON THE BEQUEST OF MOVABLES	233
(β) CONSTRUCTION OF TESTAMENTARY DIS- POSITIONS OF MOVABLES.	234
(γ) THE EXERCISE OF A POWER BY WILL.	236
(iv) REVOCATION OF A WILL BY OPERATION OF LAW	238
(α) REVOCATION OF A WILL BY SUBSEQUENT CHANGE OF DOMICIL	238
(β) REVOCATION OF A WILL BY SUBSEQUENT MARRIAGE	240
B. SUCCESSION TO IMMOVABLES	241
(a) THE RULE OF THE <i>LEX SITUS</i>	242
(b) SPECIAL CASES	242
(i) CONSTRUCTION OF A WILL RELATING TO IM- MOVABLES	242
(ii) DISPOSITIONS APPLYING ALIKE TO IMMOVABLES AND MOVABLES.	243
III. ASSIGNMENT ON MARRIAGE	246
I. GENERAL OBSERVATIONS	246
A. INTRODUCTION	246
B. MARRIAGE CONTRACTS	247
2. GENERAL ASSIGNMENT ON MARRIAGE	249
A. THE PRINCIPLE STATED	249
B. EFFECT OF SUBSEQUENT CHANGE OF MATRIMONIAL DOMICIL	249
C. CRITICISM OF THE PRINCIPLE	251

CONTENTS

xvii

	PAGE
IV. ASSIGNMENT ON BANKRUPTCY	251
I. JURISDICTION	252
A. JURISDICTION OF THE ENGLISH COURTS	252
B. JURISDICTION OF THE FOREIGN COURTS	253
C. CONCURRENT BANKRUPTCIES	254
2. GENERAL ASSIGNMENT ON BANKRUPTCY	256
A. THE TITLE OF THE ENGLISH TRUSTEE TO THE ASSETS OF THE DEBTOR	258
B. THE TITLE OF A FOREIGN TRUSTEE TO THE ASSETS OF THE DEBTOR	259
C. CONFLICTING CLAIMS OF THE ENGLISH AND FOREIGN TRUSTEE IN CASE OF CONCURRENT BANKRUPTCIES	260
3. DEBTS PROVABLE IN BANKRUPTCY	261
4. DISCHARGE IN BANKRUPTCY	264
A. THE TERRITORIAL EFFECT OF AN ORDER OF DIS- CHARGE	264
B. THE EXTRA-TERRITORIAL EFFECT OF AN ORDER OF DISCHARGE	265

Division III: The Law of the Person

CHAPTER XI

THE STATUS OF THE PERSON	268
I. GENERAL OBSERVATIONS	268
1. WHAT IS STATUS?	268
2. RECOGNITION OF A FOREIGN PERSONAL STATUS	269
3. STATUS AND CAPACITY	271
4. STATUS AND THE PERSONAL LAW	272
II. THE STATUS OF LEGITIMACY	273
1. THE LAWFUL WEDLOCK THEORY	274
2. THE STATUS THEORY	275
3. PRACTICAL CONSEQUENCES FROM THE APPLICATION OF THE STATUS THEORY BY ENGLISH LAW	277
A. CHILDREN OF POLYGAMOUS MARRIAGES	277
B. CHILDREN OF PUTATIVE MARRIAGES	278
III. THE STATUS OF LEGITIMATION	280
I. LEGITIMATION BY SUBSEQUENT MARRIAGE	280
A. THE RULES OF COMMON LAW ON LEGITIMATION BY SUBSEQUENT MARRIAGE	281
B. THE RULES OF THE LEGITIMACY ACT, 1926	283
2. LEGITIMATION BY ACT OF STATE	285

IV. THE STATUS OF INFANTS UNDER GUARDIANSHIP	286
1. THE PARAMOUNT PRINCIPLE	286
2. JURISDICTION OF THE ENGLISH COURTS	287
A. JURISDICTION OVER THE PERSON OF INFANTS	287
B. JURISDICTION OVER THE PROPERTY OF INFANTS	289

CHAPTER XII

THE STATUS OF MARRIAGE	291
I. GENERAL PRINCIPLES	291
1. MONOGAMOUS AND POLYGAMOUS MARRIAGES	291
(A) THE CONCEPTION OF THE CHRISTIAN MARRIAGE	291
(B) THE EFFECT OF POLYGAMOUS MARRIAGES	292
2. THE AGREEMENT TO MARRY AND THE STATUS OF MARRIAGE	293
3. WHICH LAW OF DOMICIL ATTRIBUTES THE STATUS OF MARRIAGE ?	295
II. THE CONCLUSION OF THE MARRIAGE	297
I. THE VALIDITY OF MARRIAGES CELEBRATED OUTSIDE ENGLAND	298
A. THE RULES CONCERNING THE VALIDITY OF SUCH MARRIAGES	298
B. THE APPLICATION OF THESE PRINCIPLES	300
(a) TO THE CAPACITY OF THE PARTIES TO MARRY	300
(b) TO THE FORMALITIES OF THE MARRIAGE	301
(i) MARRIAGES SOLEMNISED IN THE LOCAL FORM	301
(ii) MARRIAGES SOLEMNISED IN THE ORIGINAL COMMON LAW FORM	303
(iii) MARRIAGES SOLEMNISED UNDER THE FOREIGN MARRIAGE ACTS, 1892-1947	305
(iv) MARRIAGES SOLEMNISED ON THE HIGH SEAS OR IN EMBASSIES	306
(c) TO THE ESSENTIALS OF THE MARRIAGE	306
2. THE VALIDITY OF MARRIAGES CELEBRATED IN ENGLAND	308
III. THE DISSOLUTION OF THE MARRIAGE	311
1. GENERAL OBSERVATIONS	311
2. DIVORCE PETITIONS	313
A. JURISDICTION	314
(a) IN ORDINARY CASES: COMPETENCE OF THE COURTS OF MATRIMONIAL DOMICIL	314
(b) EXCEPTIONS	317
(i) THE MATRIMONIAL CAUSES ACT, 1937, S. 13.	317
(ii) THE INDIAN AND COLONIAL DIVORCES	318
B. THE LAW APPLICABLE	318
C. SUITS AGAINST CO-RESPONDENTS	320

CONTENTS

xix

	PAGE
3. PETITIONS FOR ANNULMENT	321
A. DISTINCTION BETWEEN VOIDABLE AND VOID MARRIAGES	321
B. VOIDABLE MARRIAGES	323
C. VOID MARRIAGES	324
(a) JURISDICTION	324
(i) COMPETENCE OF THE COURTS OF THE PLACE OF DOMICIL	324
(ii) COMPETENCE OF THE COURTS OF THE PLACE OF SOLEMNISATION OF MARRIAGE	325
(iii) COMPETENCE OF THE COURTS OF THE PLACE OF RESIDENCE	326
(b) THE LAW APPLICABLE	329
4. PETITIONS FOR JUDICIAL SEPARATION	329
A. JURISDICTION	329
(a) COMPETENCE OF THE COURTS OF MATRIMONIAL DOMICIL	329
(b) COMPETENCE OF THE COURTS OF RESIDENCE	330
B. THE LAW APPLICABLE	331
5. PETITIONS FOR RESTITUTION OF CONJUGAL RIGHTS	331
6. APPLICATIONS FOR ANCILLARY RELIEF	332

CHAPTER XIII

THE STATUS OF THE CORPORATION	334
I. GENERAL OBSERVATIONS	334
1. INCORPORATION CREATES A STATUS	334
2. RECOGNITION OF THE FOREIGN CORPORATION	334
3. THE LAW APPLICABLE TO THE CORPORATION	336
II. THE CONSTITUTION OF THE CORPORATION	338
1. THE CREATION OF THE CORPORATION	338
2. THE INTERNAL AFFAIRS OF THE CORPORATION	338
3. THE DISSOLUTION OF THE CORPORATION	339
A. GENERAL PRINCIPLES	339
B. WINDING UP OF AN ENGLISH BRANCH OF A FOREIGN COMPANY	340
III. THE POWERS OF THE CORPORATION	342
1. THE CAPACITY OF THE CORPORATION TO TRANSACT BUSINESS	343
2. THE RIGHT OF THE CORPORATION TO SUE AND TO BE SUED	344
3. THE PERSONAL LIABILITY OF THE MEMBERS OF THE CORPORATION	344

	PAGE
IV. RULES OF INTERPRETATION RELATING TO THE CORPORATION	345
1. GENERAL OBSERVATIONS	345
2. THE "NATIONALITY" OF THE CORPORATION	345
3. THE "DOMICIL" OF THE CORPORATION	345
4. THE "RESIDENCE" OF THE CORPORATION.	347
A. FOR PURPOSES OF TAXATION	347
B. FOR PURPOSES OF JURISDICTION	350
C. FOR THE ATTRIBUTION OF THE CHARACTER OF AN ENEMY ALIEN	352

PART III: JURISDICTION

CHAPTER XIV

THE LAW OF PROCEDURE	355
I. THE DOMAIN OF THE <i>LEX FORI</i>	355
1. GENERAL OBSERVATIONS	355
2. THE DISTINCTION BETWEEN RIGHT AND REMEDY	357
II. MATTERS PERTAINING TO PROCEDURE	358
1. THE NATURE OF THE REMEDY	359
2. PROCEEDINGS IN COURT	360
A. GENERALLY.	360
B. SUITS AGAINST FOREIGN PARTNERSHIPS.	360
C. PRIORITY OF CREDITORS IN THE DISTRIBUTION OF ASSETS UNDER THE SUPERVISION OF THE COURT	361
3. EVIDENCE	363
A. GENERALLY.	363
B. THE FORM PROVIDED BY THE STATUTE OF FRAUDS, S. 4, AND THE SALE OF GOODS ACT, 1893, S. 4	363
C. THE EVIDENCE ACTS	365
4. DAMAGES	366
5. LIMITATION OF ACTIONS	370
6. EXCHANGE CONTROL RESTRICTIONS RELATING TO ACTIONS IN THE ENGLISH COURTS	371
III. PROOF OF FOREIGN LAW IN THE ENGLISH COURTS	373
1. WHERE BRITISH COURTS TAKE JUDICIAL COGNISANCE OF FOREIGN LAW	373
2. WHERE FOREIGN LAW IS A QUESTION OF FACT	374
A. PRESUMPTION THAT THE FOREIGN LAW IS THE SAME AS ENGLISH LAW	374
B. REBUTTAL OF THE PRESUMPTION	375
C. JUDICIAL ASCERTAINMENT OF FOREIGN LAW	376

CONTENTS

CHAPTER XV

xxi

PAGE

JURISDICTION OF THE ENGLISH COURTS	378
I. GENERAL PRINCIPLES OF JURISDICTION	378
1. THE TERRITORIAL LIMITS OF JURISDICTION	378
2. THE COMPETENCE OF THE COURTS. ACTIONS IN <i>PERSONAM</i> AND IN <i>REM</i>	380
3. THE COMPETENCE OF THE COURTS IN ACTIONS IN <i>PERSONAM</i>	381
A. BASED ON THE PRINCIPLES OF PRESENCE AND SUBMISSION	381
(a) THE PRINCIPLE OF PRESENCE	382
(b) THE PRINCIPLE OF SUBMISSION.	382
B. A PRINCIPLE OF EFFECTIVENESS NOT RECOGNISED BY THE ENGLISH COURTS	383
C. COMPARISON OF THE COMPETENCE OF THE ENGLISH AND FOREIGN COURTS IN ACTIONS IN <i>PERSONAM</i>	385
II. COMPETENCE OF THE ENGLISH COURTS IN ACTIONS IN <i>PERSONAM</i>	387
1. THE ORIGINAL JURISDICTION OF THE ENGLISH COURTS	387
A. JURISDICTION BASED ON PRESENCE	387
B. JURISDICTION BASED ON SUBMISSION	389
2. THE ASSUMED JURISDICTION OF THE ENGLISH COURTS	389
A. GENERAL CONDITIONS FOR THE EXERCISE OF THE ASSUMED JURISDICTION	390
B. SPECIAL CASES OF THE ASSUMED JURISDICTION	392
III. COMPETENCE OF THE ENGLISH COURTS IN ACTIONS IN <i>REM</i>	398
1. IN GENERAL	398
2. ADMIRALTY ACTIONS IN <i>REM</i>	399
IV. JURISDICTION OF THE ENGLISH COURTS TO STAY ACTIONS	400
1. POWER OF THE ENGLISH COURTS TO STAY CONCURRENT ACTIONS IN ENGLISH AND FOREIGN COURTS	401
2. EXERCISE OF POWER TO STAY CONCURRENT ACTIONS	402
V. PERSONAL EXEMPTIONS FROM THE JURISDICTION OF THE ENGLISH COURTS	404
1. PERSONS WHO CANNOT SUE (ALIEN ENEMIES)	404
A. IN GENERAL	404
B. THE DEFINITION OF AN ALIEN ENEMY	405
(a) THE DEFINITION OF AN ALIEN ENEMY AT COMMON LAW	405
(b) THE DEFINITION OF AN ENEMY UNDER THE TRADING WITH THE ENEMY ACT, 1939	407
2. PERSONS WHO CANNOT BE SUED	408
A. FOREIGN SOVEREIGNS	408
B. FOREIGN DIPLOMATIC AGENTS	411
C. FOREIGN REPRESENTATIVES OF INTERNATIONAL ORGANISATIONS	411

CHAPTER XVI

PAGE

JURISDICTION OF FOREIGN COURTS.	414
I. JURISTIC BASIS OF THE RECOGNITION OF FOREIGN JUDGMENTS	414
1. NO DIRECT ENFORCEMENT OR MERGER OF A FOREIGN JUDGMENT	414
2. RECOGNITION NOT BASED ON THE COMITY OF NATIONS	416
3. RECOGNITION BASED ON LEGAL DUTY TO OBEY FOREIGN JUDGMENT	417
II. RECOGNITION OF FOREIGN JUDGMENTS	419
I. REQUIREMENTS OF RECOGNITION	419
A. OBSERVANCE OF JUDICIAL PROCESS	419
B. COMPETENCE OF THE FOREIGN COURTS	421
(a) THE FOREIGN COURT MUST HAVE INTERNATIONAL JURISDICTION.	421
(b) COMPETENCE AS REGARDS JUDGMENTS IN PERSONAM AND IN REM	422
(i) JUDGMENTS IN PERSONAM	422
(α) IN GENERAL	422
(β) APPEARANCES WHICH DO NOT NECESSARILY AMOUNT TO SUBMISSION TO FOREIGN JURISDICTION	423
(AA) APPEARANCE UNDER PROTEST AGAINST FOREIGN JURISDICTION	424
(BB) APPEARANCE TO SAVE PROPERTY.	425
(ii) JUDGMENTS IN REM	426
C. FINALITY OF THE FOREIGN JUDGMENT	427
(a) THE JUDGMENT MUST BE <i>RES JUDICATA</i> IN THE FOREIGN COURT	427
(b) THE JUDGMENT MUST BE FOR A SUM CERTAIN IN MONEY	428
(c) CASES CONCERNING PAYMENT OF ALIMONY	429
2. EFFECT OF RECOGNITION	430
A. CONCLUSIVENESS OF THE FOREIGN JUDGMENT	430
(a) THE FOREIGN JUDGMENT CANNOT BE IMPEACHED ON ITS MERITS	430
(b) THE EXTENT OF CONCLUSIVENESS	432
B. EXCEPTIONS	433
(a) IN CASE OF FRAUD	433
(b) IN CASE OF VIOLATION OF THE PUBLIC POLICY OF THE ENGLISH <i>LEX FORI</i>	437
III. DIRECT ENFORCEMENT OF FOREIGN JUDGMENTS	438
1. JUDGMENTS EXTENSION ACT, 1868	438
2. ADMINISTRATION OF JUSTICE ACT, 1920	440
3. FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENTS) ACT, 1933	441
INDEX.	445

TABLE OF STATUTES

(Figures in heavy type indicate the page where the main treatment of a statutory provision will be found)

	PAGE
20 Hen. 3, c. 9, Bastardy	281
32 Hen. 8, c. 16, Marriage	307
32 Hen. 8, c. 38, Marriage	307
34 Hen. 8, c. 4, Statute of Bankrupts	251
29 Car. 2, c. 3, Statute of Frauds, 1677	
s. 4	363, 364
3 & 4 Ann., c. 9, Promissory Notes	133
6 Ann., c. 2, Great Britain	22
7 Ann., c. 12, Diplomatic Privileges Act, 1708	
s. 3	412
s. 5	412
9 Geo. 2, c. 36, Mortmain Act, 1736	171
26 Geo. 2, c. 33, Marriage Act, 1753	301, 307
12 Geo. 3, c. 11, Royal Marriage Act, 1772	307
14 Geo. 3, c. 78, Fire Prevention (Metropolis) Act, 1774	239
39 & 40 Geo. 3, c. 98, Accumulations Act, 1800	170, 242
55 Geo. 3, c. 184, Stamp Act, 1815	
s. 37	223
5 & 6 Will. 4, c. 54, Marriage Act, 1835	277, 307
7 Will. 4 and 1 Vict., c. 26, Wills Act, 1837	228, 240
s. 9	169
s. 15	231
s. 18	240
s. 27	237, 238
10 & 11 Vict., c. 58, Quakers and Jews Marriages Validation Act, 1847	292
11 & 12 Vict., c. 21, Indian Insolvency Act, 1848	259
14 & 15 Vict., c. 99, Evidence Act, 1851	
s. 7	366
15 & 16 Vict., c. 76, Common Law Procedure Act, 1852	
s. 2	418
s. 18 and s. 19	386, 387
17 & 18 Vict., c. 104, Merchant Shipping Act, 1854	
s. 388	154
20 & 21 Vict., c. 60, Irish Bankrupt and Insolvent Act, 1857	259
20 & 21 Vict., c. 77, Court of Probate Act, 1857	218
20 & 21 Vict., c. 85, Matrimonial Causes Act, 1857	311, 314
s. 6	327, 331
s. 7	331
s. 22	331
s. 33	321
22 & 23 Vict., c. 63, British Law Ascertainment Act, 1859	373, 376, 377
24 & 25 Vict., c. 114, Wills Act, 1861	39, 51, 169, 228, 229, 237, 239, 240
s. 1	230, 231, 232, 235, 239, 240
s. 2	230, 231, 232, 235, 239, 240
s. 3	228, 231, 232, 235, 239, 240, 241
24 & 25 Vict., c. 11, Foreign Law Ascertainment Act, 1861	376, 377
31 & 32 Vict., c. 54, Judgments Extension Act, 1868	438, 439, 440, 441, 443
31 & 32 Vict., c. 101, Titles to Land Consolidation (Scotland) Act, 1868	41
36 & 37 Vict., c. 66, Supreme Court of Judicature Act, 1873	156, 219, 311
45 & 46 Vict., c. 31, Inferior Courts Judgments Extension Act, 1882	438

	PAGE
45 & 46 Vict., c. 61, Bills of Exchange Act, 1882	133
s. 4	134 , 135
s. 21	136
s. 31	139
s. 51	136
s. 53	133
s. 57	133
s. 72 (1)	135, 136 , 139
s. 72 (2)	52, 135, 137 , 138, 139, 239
s. 72 (3)	135, 140 , 141, 142
s. 72 (4)	135, 140
s. 72 (5)	135, 140 , 141
s. 73	134
s. 89	134
45 and 46 Vict., c. 75, Married Women's Property Act, 1882	246
49 & 50 Vict., c. 33, International Copyright Act, 1886	359
50 & 51 Vict., c. 57, Deeds of Arrangement Act, 1887	184
51 & 52 Vict., c. 42, Mortmain and Charitable Uses Act, 1888	171
53 & 54 Vict., c. 5, Lunacy Act, 1890	273
s. 110	273
s. 131 (2)	273
53 & 54 Vict., c. 37, Foreign Jurisdiction Act, 1890	376
s. 5	117
54 & 55 Vict., c. 39, Stamp Act, 1891	171, 242, 343
54 & 55 Vict., c. 73, Mortmain and Charitable Uses Act, 1891	220
55 & 56 Vict., c. 6, Colonial Probates Act, 1892	51, 303, 304, 305 , 365
55 & 56 Vict., c. 23, Foreign Marriage Act, 1892	51, 305
s. 1	305
s. 8	306
s. 11	365
s. 16	365
s. 17	306
s. 19	305
s. 22	170
55 & 56 Vict., c. 58, Accumulations Act, 1892	246
56 & 57 Vict., c. 63, Married Women's Property Act, 1893	181
56 & 57 Vict., c. 71, Sale of Goods Act, 1893	363, 364
s. 1	154, 345
s. 4	345, 353
57 & 58 Vict., c. 60, Merchant Shipping Act, 1894	156, 159
s. 1	331, 332
s. 503	307
58 & 59 Vict., c. 39, Summary Jurisdiction (Married Women) Act, 1895	154, 156, 159
7 Edw. 7, c. 47, Deceased Wife's Sister's Marriage Act, 1907	306
1 & 2 Geo. 5, c. 5, c. 57, Maritime Conventions Act, 1911	154
2 & 3 Geo. 5, c. 15, Marriages in Japan (Validity) Act, 1912	154
2 & 3 Geo. 5, c. 31, Pilotage Act, 1913	220
3 & 4 Geo. 5, c. 16, Foreign Jurisdiction Act, 1913	259
3 & 4 Geo. 5, c. 20, Bankruptcy (Scotland) Act, 1913	407
s. 97	22, 284
4 & 5 Geo. 5, c. 12, Aliens Restriction Act, 1914	251, 252, 254, 256, 258, 263, 265
4 & 5 Geo. 5, c. 17, British Nationality and Status of Aliens Act, 1914	252
4 & 5 Geo. 5, c. 59, Bankruptcy Act, 1914	253
s. 1	260
s. 4	256, 258
s. 37	260
s. 53	258, 263, 379
s. 122	284
s. 167	
8 & 9 Geo. 5, c. 38, British Nationality and Status of Aliens Act, 1918	

TABLE OF STATUTES

XXV

PAGE

8 & 9 Geo. 5, c. 40, Income Tax Act, 1918, Schedule D, Case IV, rule 2a	346, 347
Case V, rule 3a	346, 347
9 & 10 Geo. 5, c. 71, Sex Disqualification (Removal) Act, 1919	87
10 & 11 Geo. 5, c. 33, Maintenance Orders (Facilities for Enforcement) Act, 1920	
s. 1	333
s. 4	333
s. 5	333
10 & 11 Geo. 5, c. 81, Administration of Justice Act, 1920	
ss. 9-14	440, 441, 443
11 & 12 Geo. 5, c. 24, Deceased Brother's Widow's Marriage Act, 1921	277, 307
12 & 13 Geo. 5, c. 44, British Nationality and Status of Aliens Act, 1922	284
14 & 15 Geo. 5, c. 22, Carriage of Goods by Sea Act, 1924	127
15 & 16 Geo. 5, c. 18, Settled Land Act, 1925	
s. 29 (4)	170, 243, 343
s. 119	170, 243, 343
Schedule	170, 243, 343
15 & 16 Geo. 5, c. 20, Law of Property Act, 1925	
s. 40 (1)	364
s. 52	169
s. 163	170
s. 164	170, 233
s. 177	240
15 & 16 Geo. 5, c. 23, Administration of Estates Act, 1925	217, 244
s. 10	221
s. 45	283
15 & 16 Geo. 5, c. 45, Guardianship of Infants Act, 1925	
s. 1	286, 289
s. 5 (4)	88
15 & 16 Geo. 5, c. 49, Supreme Court of Judicature (Consolidation) Act, 1925	218, 219, 220, 323, 331
s. 20	218
s. 21	327
s. 22	379, 399
s. 33	399
s. 99	387
s. 100	387
s. 102	374
s. 189	321
s. 190	332
15 & 16 Geo. 5, c. 51, Summary Jurisdiction (Separation and Maintenance) Act, 1925	331
16 & 17 Geo. 5, c. 7, Bankruptcy (Amendment) Act, 1926	252
16 & 17 Geo. 5, c. 40, Indian and Colonial Divorce Jurisdiction Act, 1926	318
16 & 17 Geo. 5, c. 60, Legitimacy Act, 1926	72, 86, 88, 281, 282, 283, 284
s. 1 (2)	94, 281, 283
s. 2	284
s. 3	281, 283
s. 7	285
s. 8	283
s. 10	281, 282
17 & 18 Geo. 5, c. 43, Colonial Probates (Protected States and Mandated Territories) Act, 1927	220
18 & 19 Geo. 5, c. 26, Administration of Justice Act, 1928	220
19 & 20 Geo. 5, c. 23, Companies Act, 1929	
s. 338	340, 342
19 & 20 Geo. 5, c. 36, Age of Marriage Act, 1929	302, 307
20 & 21 Geo. 5, c. 15, Divorce Jurisdiction Act, 1930 (a Canadian enactment)	318
20 & 21 Geo. 5, No. 43, Divorce and Matrimonial Causes Act, 1930 (a New Zealand enactment)	318

	PAGE
22 & 23 Geo. 5, c. 4, Statute of Westminster, 1931	258, 265
22 & 23 Geo. 5, c. 36, Carriage by Air Act, 1932	369, 398
22 & 23 Geo. 5, c. 55, Administration of Justice Act, 1932	219
23 & 24 Geo. 5, c. 13, Foreign Judgments (Reciprocal Enforcement) Act, 1933	440, 441, 442, 443
s. 1 (2)	442
s. 1 (3)	443, 444
s. 2 (1)	443
s. 2 (2)	444
s. 2 (3)	444
s. 4 (1)	444
s. 5	444
s. 7	440, 441
s. 8	443
23 & 24 Geo. 5, c. 4, Evidence (Foreign, Dominion and Colonial Documents) Act, 1933	365, 366
24 & 25 Geo. 5, c. 41, Law Reform (Miscellaneous Provisions) Act, 1934	367
s. 3	367
25 & 26 Geo. 5, c. 30, Law Reform (Married Women and Joint Tortfeasors) Act, 1935	246
26 Geo. 5 & 1 Edw. 8, c. 34, Finance Act, 1936	346
s. 18	51
1 Edw. 8 & 1 Geo. 6, c. 57, Matrimonial Causes Act, 1937	317
s. 1	319
s. 2	329
s. 6	322
s. 7 (1) (a)	52, 86, 317, 318, 323, 325, 330, 332
s. 13	233, 234
1 & 2 Geo. 6, c. 45, Inheritance (Family Provision) Act, 1938	234
s. 1	234
s. 5	307
s. 6	307
2 & 3 Geo. 6, c. 34, Marriage (Scotland) Act, 1939	347
s. 5	370
s. 9	172, 370
2 & 3 Geo. 6, c. 21, The Limitation Act, 1939	405, 406, 407
s. 2	407
s. 3 (2)	407
s. 16	347
2 & 3 Geo. 6, c. 89, Trading with the Enemy Act, 1939	318
s. 2	6
s. 15	412
2 & 3 Geo. 6, c. 109, Finance (No. 2) Act, 1939	6
s. 12 (2)	6
3 & 4 Geo. 6, c. 35, Indian and Colonial Divorce Jurisdiction Act, 1940	6
3 & 4 Geo. 6, c. 51, Allied Forces Act, 1940	412
4 & 5 Geo. 6, c. 7, Diplomatic Privileges (Extension) Act, 1941	6
4 & 5 Geo. 6, c. 21, Allied Powers (Maritime Courts) Act, 1941	6
5 & 6 Geo. 6, c. 31, United States of America (Visiting Forces) Act, 1942	98, 117
6 & 7 Geo. 6, c. 40, Law Reform (Frustrated Contracts) Act, 1943	386
7 Geo. 6, c. 36, Companies Act, 1943 (a Western Australian enactment)	88, 288
s. 347	317
7 & 8 Geo. 6, c. 8, Guardianship (Refugee Children) Act, 1944	408, 413
7 & 8 Geo. 6, c. 43, Matrimonial Causes (War Marriages) Act, 1944	413
7 & 8 Geo. 6, c. 44, Diplomatic Privileges (Extension) Act, 1944	413
s. 1 (3)	413
Schedule	122
9 & 10 Geo. 6, c. 19, Bretton Woods Agreement Act, 1945	

TABLE OF STATUTES

xxvii

PAGE

9 & 10 Geo. 6, c. 66, Diplomatic Privileges (Extension) Act, 1946	
s. 2	408, 413
Schedule	413
10 & 11 Geo. 6, c. 14, Exchange Control Act, 1947	122, 371
10 & 11 Geo. 6, c. 30, Indian Independence Act, 1947	
s. 17	318
s. 18	442
10 & 11 Geo. 6, c. 33, Foreign Marriages Act, 1947	51
s. 22	305
11 & 12 Geo. 6, c. 3, Burma Independence Act, 1947.	318, 442
11 & 12 Geo. 6, c. 7, Ceylon Independence Act, 1947.	318
11 & 12 Geo. 6, c. 10, Emergency Laws (Miscellaneous Provisions) Act, 1947	288
Companies Act, 1948	349, 350
s. 399.	340, 342
s. 400.	340, 341
s. 406.	350
s. 407.	336
s. 410.	336
s. 411.	336
s. 412.	336, 350, 351
s. 415.	350
s. 470.	350
Part X	336, 350
British Nationality Bill, 1948	23, 230, 284

TABLE OF STATUTORY INSTRUMENTS

A. GENERAL

	PAGE		PAGE
Foreign Marriages Order, 1913 (S.R. & O. 1913, No. 1270)	305	Foreign Judgments (Belgium) Order, 1936 (S.R. & O. 1936, No. 1169)	384, 442
Art. 4	305	Government of India (Adaptation of Acts of Parliament) Order, 1937 (S.R. & O. 1937, No. 230)	318
Treaty of Peace Order, 1919 (S.R. & O. 1919, No. 1517)	206, 207	Evidence (France) Order, 1937 (S.R. & O. 1937, No. 515)	366
Art. 1 (XVI)	206, 207	Reciprocal Enforcement of Judgments (British India and Burma) Order, 1938 (S.R. & O. 1938, No. 1363)	442
Art. 2	345	Diplomatic Privileges (U.N.R.R.A.) Order in Council, 1945 (S.R. & O. 1945, No. 79)	411
Aliens Order, 1920 (S.R. & O. 1920, No. 448)	407	Diplomatic Privileges (U.N.I.O., The Refugees Committee and E.A.C.) Order, 1945 (S.R. & O. 1945, No. 84)	411
Art. 20	407	Diplomatic Privileges (The Transport Organisation and War Crimes Commission) Order, 1945 (S.R. & O. 1945, No. 1211)	413
Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (S.R. & O. 1923, No. 405)	231	Bretton Woods Agreements Order, 1946 (S.R. & O. 1946, No. 36)	122
Foreign Marriages Order, 1925 (S.R. & O. 1925, No. 92)	305	Diplomatic Privileges (European Coal Organisation) Order, 1946 (S.R. & O. 1946, No. 895)	413
Kenya Divorce Jurisdiction Order, 1928 (S.R. & O. 1928, No. 635)	318	Diplomatic Privileges (General Amendment) Order, 1946 (S.R. & O. 1946, No. 2202)	413
Straits Settlements Divorce Jurisdiction Order, 1931 (S.R. & O. 1931, No. 851)	318	Diplomatic Privileges (United Nations and International Court of Justice) Order, 1947 (S.R. & O. 1947, No. 1772)	408, 413
Straits Settlements (non-Domiciled Parties) Divorce Rules, 1931 (S.R. & O. 1931, No. 1103)	318	Exchange Control (Definition of Scheduled Territories) Order, 1947 (S.R. & O. 1947, No. 2042)	372
Jamaica Divorce Jurisdiction Order, 1932 (S.R. & O. 1932, No. 475)	318	Exchange Control (Definition of Scheduled Territories) (No. 2) Order, 1947 (S.R. & O. 1947, No. 2691)	372
Jamaica (non-Domiciled Parties) Divorce Rules, 1932 (S.R. & O. 1932, No. 646)	318	Foreign Marriage Order in Council, 1947 (S.R. & O. 1947, No. 2875)	305
Evidence (Belgium) Order, 1933 (S.R. & O. 1933, No. 383)	366	Exchange Control (Definition of Scheduled Territories) Order, 1948 (S.I. 1948, No. 284)	372
Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933 (S.R. & O. 1933, No. 1073)	440, 442		
Foreign Jurisdiction (Probates) Order, 1935 (S.R. & O. 1935, No. 522)	220		
Hong Kong Divorce Jurisdiction Order, 1935 (S.R. & O. 1935, No. 836)	318		
Ceylon Divorce Jurisdiction Order, 1936 (S.R. & O. 1936, No. 562)	318		
Reciprocal Enforcement of Foreign Judgments (France) Order, 1936 (S.R. & O. 1936, No. 609)	384, 442		
Reciprocal Enforcement of			

B. RULES OF COURTS

	PAGE		PAGE
Rules of the Supreme Court, 1883		Rules of the Supreme Court, 1883	
O. 2 r. 4	390	O. 22 r. 22	372
O. 3 r. 4 (2)	372	O. 25	6
O. 4 r. 1	372	r. 2	6
r. 2 (1)	372	r. 4	384, 400
O. 5 r. 11	388	O. 41	
O. 9	388	r. 1	440
r. 2	388	O. 41A	441
r. 8	351	O. 41B	443
r. 12	400	r. 5(3)	444
O. 11, 173, 209, 264, 288, 352, 386,		r. 9(3)	444
387, 389, 390, 391, 398		r. 10	444
r. 1(a)	392	O. 42	
r. 1(b)	392	r. 1(2)-(4)	372
r. 1(c)	352, 392	r. 28	438
r. 1(d)	393	O. 48A	361, 398
r. 1(e)	393, 396, 397	r. 1	398
r. 1(ee)	396, 397	r. 3	398, 405
r. 1(f)	396, 397	O. 71	
r. 1(g)	396	r. 1	352, 392
r. 1(h)	397	Order of the President of the	
r. 1(i)	397	Probate Division dated	
r. 2	392, 398	17th March, 1925	220
r. 2(a)	389, 390	Matrimonial Causes Rules, 1947	
r. 4	390, 392	r. 3(2)	332
r. 5	392	r. 9	329
r. 6	392	County Court (Exchange Con-	
r. 7	392	trol) Rules, 1947	372
r. 8	392	Rules of the Supreme Court	
O. 14	438	(Exchange Control), 1947	372
O. 16 r. 9	372		
r. 9A	372		

TABLE OF CASES

(Figures in heavy type indicate the page where the main treatment of the decision will be found)

	PAGE
Abdul Majid Belshah, In the Estate of (1928), <i>B.Y.B.I.L.</i> , 185 . . .	278
Aberdeen Arctic Company v. Sutter (1862), 6 L.T. 229 . . .	257
Abingdon v. North Bridgewater (1839), 23 Pick 170 (Mass.) . . .	72
Abouloff v. Oppenheimer (1882), 10 Q.B.D. 295 . . .	
423, 426, 427, 428, 429, 432, 433, 434, 435, 436	
Abraham v. A.G., [1934] P. 17 . . .	284
Achillopoulos, <i>In re</i> , [1928] 1 Ch. 433 . . .	222, 224, 225
Adams v. Adams, [1941] 1 K.B. 536 . . .	322
Adams v. Clutterbuck (1883), 10 Q.B.D. 403 . . .	168
Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd., [1934] A.C. 122 . . .	103, 107, 120
Adriatic, The, [1931] P. 241 . . .	103, 127
Aganoor's Trust, <i>In re</i> (1895), 64, L.J. Ch. 521 . . .	226
Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co., [1921] 3 K.B. 532 . . .	53, 55, 57, 59, 417
Aktieselskab August Freuchen v. Steen Hansen & others (1919), 1 Ll. L.R. 393 . . .	127
Alcock v. Smith, [1892] 1 Ch. 238 . . .	137, 138, 139, 184, 185, 188, 196
Alfred Nobel, The, [1918] P. 293 . . .	436
Alison's Trusts, <i>Re</i> , (1874), 31 L.T. 638 . . .	302
Allen, <i>In re</i> (1945), 114 L.J.Ch. 298 . . .	236, 245
Allen v. Anderson (1846), 5 Hare 163 . . .	41
Allen v. Kemble (1848), 6 Moo. P.C. 314 . . .	368
Alvez v. Hodgson (1797), 7 T.R. 241 . . .	53, 116
Amalia, The (1866), 1 Moo. P.C. (N.S.) 471 . . .	156
Amand, <i>In re</i> (No. 1), [1941] 2 K.B. 239; (No. 2), [1942] 1 K.B. 445 . . .	6
Amazona, The, [1940] 1 All E.R. 269 . . .	412
American Thread Co. v. Joyce (1913), 29 T.L.R. 266, 6 Tax Cases 163 . . .	337, 348
Anchor Line (Henderson Brothers) Ltd. <i>In re</i> , [1937] Ch. 483 . . .	178
Anderson v. Equitable Life Assurance (1926), 142 T.L.B. 302 . . .	121, 141
Anderson, <i>In re</i> , [1911] 1 K.B. 896 . . .	254, 255, 256, 259, 261
Andros, <i>In re</i> (1883), 24 Ch. D. 637 . . .	274, 275, 276, 282
Anghinelli v. Anghinelli, [1918] P. 247 . . .	330, 331
Anglesey, <i>Re</i> , [1901] 2 Ch. 548 . . .	367
Anglo-International Bank, <i>In re</i> (1943), 59 T.L.R. 312 . . .	404, 407
Annesley, <i>In re</i> , [1926] 1 Ch. 692 . . .	73, 80, 90, 91, 92
Anstruther v. Adair (1834), 2 My. & K. 513 . . .	247
Anstruther v. Chalmers (1826), 2 Sim. 1, 4 . . .	235, 236
Anziani, <i>In re</i> , [1930] 1 Ch. 407 . . .	203, 210
Apostolic Throne of St. Jacob v. Saba Eff Said, [1940] 1 All E.R. 54 . . .	121
Apt v. Apt, [1947] P. 127; [1948] P. 83 . . .	302
Arantzazu Mendiz, The, [1939] A.C. 251 . . .	60, 399, 411
Arglasse v. Muschamp (1682), 1 Vern. 75 . . .	23, 163
Armitage v. A.G., [1906] P. 135 . . .	315, 316
Armytage v. Armytage, [1898] P. 178 . . .	312, 330, 331
Artola Hermanos, <i>In re</i> (1890), 24 Q.B.D. 640 . . .	255, 256, 261
Askew, <i>In re</i> , [1930] 2 Ch. 259 . . .	9, 28, 90, 91, 93, 94, 96, 97
A.G. v. Alexander (1875), L.R. 10 Ex. 20 . . .	349
A.G. v. Bouwens (1838), 4 M. & W. 171 . . .	208
A.G. v. De Keyser's Royal Hotel, [1920] A.C. 508 . . .	59
A.G. v. Hope (1834), 1 C.M. & R. 560 . . .	219, 222
A.G. v. Mill (1827), 3 Russ 328; (1831), 2 Dow. & Cl. 393 . . .	170
A.G. v. Rowe (1862), 31 L.J. (N.S.) Ex. Ch. 314 . . .	68
A.G. for Alberta v. Cook, [1926] A.C. 444 . . .	1, 51, 85, 86, 314, 315, 317, 328

TABLE OF CASES

xxx

	PAGE
B's Settlement, <i>In re</i> (1940), 109 L.J.Ch. 20	286, 287, 288
<i>Baarn</i> , The (No. 1), [1933] P. 251	369
Badische Anilin and Soda Fabrik v. Henry Johnson & Co., [1896] 1 Ch. 25	391
Bailey v. Bailey (1884), 13 Q.B.D. 855	429
Bain v. Whitehaven & Furness Junction By. Co. (1850), 3 H.L.Cas. 1	363
Baindail v. Baindail, [1946] P. 122	48, 112, 270, 272, 278, 292, 293
Baku Consolidated Oilfields, <i>In re</i> , (1944), 88 Sol. J. 84	340
Balfour v. Scott (1793), 6 Bro. P.C. 550	227, 245
Ballantyne v. Mackinnon, [1896] 2 Q.B. 455	433
Banco de Bilbao v. Sancha, [1938] 2 K.B. 176	338
Banco de Portugal v. Waddell (1880), 5 App. Cas. 161	258, 262, 263
Banco de Vizcaya v. Don Alfonso de Borbon y Austria, [1935] 1 K.B. 140	54, 55, 58
Bank of Africa Ltd. v. Cohen, [1909] 2 Ch. 129	127, 128, 129, 177
Bank of Australasia v. Harding (1850), 9 C.B. 661	360, 415
Bank of Australasia v. Nias (1851), 16 Q.B. 717	419, 430
Bank of Ethiopia v. National Bank of Egypt and Liguori, [1937] 1 Ch. 513	338
Banks, <i>In re</i> , [1902] 2 Ch. 333	131, 248
Bankruptcy Notice, A, <i>In re</i> (1898), 1 Q.B. 383	440
Banque Internationale de Commerce de Petrograd v. Goukassow, [1923] 2 K.B. 682; [1925] A.C. 150	340, 343
Barbuit's Case (1737), Cas. temp. Talb. 280	24
Baretto v. Young, [1900] 2 Ch. 339	237
Barford v. Barford, [1918] P. 140	375
Baring v. Ashburton (1886), 54 L.T. 463	245
Barnett v. Kinnery (1893), 147 U.S. 476	265
Barnett's Trusts, <i>In re</i> , [1902] 1 Ch. 847	227
Baroness von Buseck, In the Goods of (1881), 6 P.D. 211	230
Baschet v. London Illustrated Standard Co., [1900] 1 Ch. 73; 69 L.J. Ch. 35	152, 359
Bateman v. Bateman, [1901] P. 136	332
Bater v. Bater, [1906] P. 209	86, 312, 313, 314, 316, 437
Batthyany v. Walford (1887), 36 Ch. D. 269	43
Bayle v. Sacker (1888), 39 Ch. D. 249	389
Beamish v. Beamish (1861), 9 H.L.Cas. 272	305
Beatty v. Beatty, [1924] 1 K.B. 807	374, 427, 428, 429, 430
Beaumont, <i>In re</i> , [1893] 3 Ch. 490	86, 87
Bechuanaland Exploration Company v. London Trading Bank, [1898] 2 Q.B. 658	133
Beckford v. Kemble (1822), 1 Sim. & St. 7	180
Beckford v. Wade (1805), 17 Ves. Jun. 87	172, 370
Bell v. Kennedy (1868), L.R. 1 Sc. & Div. 307	66, 67, 77
Benaim & Co. v. Debono, [1924] A.C. 514	32, 103, 118, 120
Berchtold, <i>In re</i> , [1923] 1 Ch. 192	39, 40, 226
Beresford v. Royal Insurance Company Limited, [1936] 2 All E.R. 1059	98
Berry v. Shead (1886), 7 N.S.W.R. 39	418
Berthiaume v. Dastous, [1930] A.C. 79	278, 279, 294, 302
Bethell, <i>In re</i> (1888), 38 Ch. D. 220	36, 37, 278
Birthwhistle v. Vardill (1826), 5 B. & C. 438; (1835), 2 Cl. & F. 571; (1840), 7 Cl. & F. 895	62, 161, 167, 168, 242, 274, 282, 283
Bischoffsheim, <i>In re</i> ; Cassel v. Grant [1948] 1 Ch. 79	275, 276
Blad v. Bamfield (1674), 3 Swan. 604	153
Blad's Case (1673), 3 Swan. 603	153, 155
Bleckly, <i>In re</i> , [1920] 1 Ch. 450	284
Blimham, <i>In re</i> (1866), 2 Eq. 23	254
Bloomfield v. Serenyi, [1945] 2 All E.R. 646	391, 397
Bloxham v. Favre (1883), 8 P.D. 101; (1884), 9 P.D. 130	230
Boger v. Boger, [1908] P. 300	320
Boissevain v. Weil, [1948] 1 All E.R. 893	103, 122, 405, 407
Bold Buccleuch, The (1851), 7 Moo. P.C. 267	399

Boldrini v. Boldrini, [1932] P. 9	77, 79, 83
Bonacina, <i>In re</i> , [1912] 2 Ch. 394	115
Bonanza Creek Gold Mining Co. Ltd. v. A.G. for Quebec, [1916] A.C. 566	344
Bonaparte v. Bonaparte, [1892] P. 402	436
Bonelli, In the Goods of, (1875), 1 P.D. 69	376
Boucher v. Lawson (1734), Cas. temp. Hardw. 85	53
Bourgoise, <i>In re</i> , [1889] 41 Ch. D. 310	288
Bowman v. Reeve (1721), Prec. Ch. 577	183, 184
Brabo, The, [1948] P. 33	391, 397
Bradfield v. Swanton, [1931] I.R. 446	77
Bradford v. Young (1885), 29 Ch. D. 617	235, 236
Bradlaugh v. De Rin (1868), L.R. 3 C.P. 538; (1870), L.R. 5 C.P. 473	137
Bradstreet v. Neptune Ins. Co. (1839), 3 Sumn. 600	416
Bragg v. Bragg, [1925] P. 20	333
Brailley v. Rhodesia Consolidated Ltd., [1910] 2 Ch. 95	375
Branley v. South Eastern Railway Co. (1862), 12 C.B. (N.S.) 63	338
Brassard v. Smith, [1925] A.C. 371	208
Bremer v. Freeman (1857), 10 Moo. P.C. 306	51, 229, 376
Breull, <i>Ex parte</i> (1880), 16 Ch. D. 487	392
Briesemann, In the Goods of, [1894] P. 260	222
Brinkley v. A.G. (1890), 15 P.D. 76	36, 37, 292
Bristow v. Sequeville, (1850), 5 Ex. 275; (1850), 19 L.J. Ex. 289	116, 376
British American Continental Bank, <i>Re</i> , Crédit Général Liégeois Claim, [1922] 2 Ch. 589	369
British American Continental Bank, <i>Re</i> , Goldzieher's and Penso's Claim, [1922] 2 Ch. 575	369
British American Continental Bank, <i>Re</i> , Lissers's Claim, [1923] 1 Ch. 276	369
British Bank for Foreign Trade Ltd. v. Russian Commercial & Industrial Bank (1921), 38 T.L.R. 65	121
British Linen Co. v. Drummond (1830), 10 B. & C. 903	357, 370
British South Africa Co. v. De Beers Consolidated Mines Ltd., [1909] Ch. 129; [1910] 1 Ch. 354; [1910] 2 Ch. 502	101, 103, 105, 106, 118, 128, 129, 130, 177, 180
Broadmayne, The, [1916] P. 64	59, 400
Brodie v. Barry (1813), 2 V. & B. 127	41, 244, 245
Broken Hill Proprietary Co. Ltd. v. Latham, [1933] 1 Ch. 373	107, 120, 121
Brook v. Brook (1861), 9 H.L. Cas. 193	296, 299, 307, 309
Brotherhood of Railroad Trainmen v. Adams (1928), 222 Moo. App. 689; 5 S.W. (2d) 96	115
Brown v. Collins (1883), 25 Ch. D. 56	288
Brown v. Gregson, [1920] A.C. 860	180, 245, 246
Brown v. Lynch 2 Bradf. Surrogate Rep. N.Y. 214	86, 87
Bruce v. Bruce (1790), 2 Bro. P.C. 566	227
Buchanan v. Rucker (1808), 9 East 192	386, 420
Buerger v. New York Life Assurance Co. (1927), 43 T.L.R. 601	376
Bullock v. Caird (1875), L.R. 10 Q.B. 276	361
Burbridge, <i>Re</i> , [1902] 1 Ch. 426	273
Busfield, <i>In re</i> (1886), 32 Ch. D. 123	390
Bushby v. Munday (1821), 5 Madd. 297	401
Cail v. Papayanni, The <i>Amalia</i> (1863), 1 Moo. P.C. (N.S.) 471	156
Caldwell v. Van Vissingen (1851), 9 Hare 415	10
Callander v. Dittrich (1842), 4 M. & G. 68	432
Callender, Sykes & Co. v. Colonial Secretary of Lagos and Davies, [1891] A.C. 460	258
Calvin's Case (1608), 7 Rep. 2a	22, 168
Cambell v. Dent (1838), Moo. P.C. 292	128
Cammel v. Sewell (1858), 3 H. & N. 617; (1860), 5 H. & N. 728	188, 189, 192, 194, 195

TABLE OF CASES

xxxiii

	PAGE
Campbell v. Beaufoy (1859), Johns, 320	233, 234
Campbell v. Campbell (1866), L.R. 1 Eq. 383	236
Canadian Pacific Railway Co. v. Parent, [1917] A.C. 195	52, 152
Carden v. Carden (1837), 1 Curt. 558	331
Cardwell v. Cardwell, 37 Missouri 350	42
Carmichael v. Carmichael, (1846) 2 Ph. 101	223
Carr v. Fracis Times & Co., [1902] A.C. 176	148, 153, 156
Carrick v. Hancock (1895), 12 T.L.R. 59	382, 388
Carron Iron Co. v. Maclaren (1855), 5 H.L. Cas. 416	400
Carteret v. Petty (1676), 2 Swan. 323	180
Cartwright, Cartwright v. Smith, Re, [1939] 1 Ch. 90	40, 230
Cartwright v. Pettus (1676), 2 Cas. in Ch. 214	166
Casdagli v. Casdagli, [1918] P. 89; [1919] A.C. 145	69, 77, 83, 84, 319
Castrique v. Behrens (1861), 30 L.J.Q.B. 163	436
Castrique v. Imrie (1870), L.R. 4 H.L. 414	188, 388, 426, 427, 430, 431, 432, 436
Catherwood v. Caslon (1844), 13 M. & W. 261	804
Catterall v. Catterall (1847), 1 Rob. Ecc. 580	304
Celia, S.S. v. Volturno, S.S., [1921] 2 A.C. 544	369
Central India Mining Company v. Société Coloniale, [1920] 1 K.B. 771	124
Cesena Sulphur Company v. Nicholson (1876), 1 Ex. D. 428	337, 348
Chamberlain v. Napier (1880), 15 Ch. D. 614	106, 130, 131, 248
Champant v. Lord Ranelagh (1700), Prec. Ch. 128	368
Chaney v. Murphy, [1948] W.N. 130	390, 397, 402
Chapman v. Cottrell (1865), 34 L.J. Exch. 186	136
Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883), 10 Q.B.D. 521	102, 103, 127, 155, 157, 158
Chatard's Settlement, In re, [1899] 1 Ch. 712	289, 290
Chatenay v. Brazilian Submarine Telegraph, [1891] 1 Q.B. 79	103, 107, 114, 118, 120
Chaudière Gold Mining Co. of Boston v. Desbarats (1873), L.R. 5 P.C. 277	344
Cherry v. Thompson (1872), L.R. 7 Q.B. 573	395
Chesham, Lord, In re (1886), 31 Ch. D. 466	245
Chesterman's Trust, In re, [1923] 2 Ch. 466	121, 141, 368, 369
Chetti v. Chetti, [1909] P. 67	26, 48, 64, 300
Chia Khwee Eng v. Chia Poh Choon, [1923] A.C. 424	236
Choa Eng Wan v. Choa Giang Tee, [1923] A.C. 469	236
Christian v. Christian (1897), 78 L.T. 86	329
Churchill & Co. Ltd. v. Lonberg (1941), 165 L.T. 274	388
Chung Chi Cheung v. R. (1938), 55 T.L.R. 184	4, 156
City of Berne v. Bank of England (1804), 9 Ves. 347	338
City of Mecca, The (1881), 6 P.D. 106	399
Clegg v. Levy (1812), 3 Camp. 166	116
Coats's Trusts, In re; Coats v. Gilmour, [1948] Ch. 1; (1948), L.T.R. 193	5
Cockrell v. Cockrell (1856), 25 L.J. Ch. 730	68
Cohen v. Rothfield, [1919] 1 K.B. 410	401, 402, 403
Cohn, In re, [1945] Ch. 5	43, 226, 357, 363
Collier v. Rivaz (1841), 2 Curt. 855	90, 92, 93, 96, 97
Collins v. A.G. (1931), 47 T.L.R. 484	284
Collins v. North British and Mercantile Insurance Co., [1894] 3 Ch. 228	397
Colonial Bank v. Cady and Williams (1888), 38 Ch. D. 388; (1890), 15 App. Cas. 267	208, 210
Colorado, The, [1923] P. 102	356, 357, 361, 362, 363, 374
Commercial Bank Corporation of India, In re (1870), L.R. 5 Ch. A. 314	223
Commissioner of Stamps v. Hope, [1891] A.C. 476	207
Commissioners of Inland Revenue v. Muller & Co.'s Margarine Ltd., [1901] A.C. 217	202
Companhia de Moçambique v. British South Africa Company, [1892] 2 Q.B. 358; [1893] A.C. 602	6, 161, 162, 164, 165, 166, 172, 177
Compañía Mercantil Argentina v. United States Shipping Board (1924), 40 T.L.R. 601	409

	PAGE
<i>Compañía Naviera Vascongada v. S.S. Christina</i> , [1938] A.C. 485	60, 399,
	400, 408 , 409, 410
<i>Compton v. Bearcroft</i> (1769), 2 Hagg. Cons. 444	24, 307
<i>Concha v. Concha</i> (1886), 11 App. Cas. 541	233
<i>Concha v. Murietta</i> (1889), 40 Ch. D. 543	373, 376
<i>Connolly Broths. Ltd., In re</i> , [1911] 1 Ch. 731	402
<i>Continental Lines Société Anonyme v. W. H. Holt & Sons</i> (1932), 43 Ll. L.R. 392	415, 428, 429, 432
<i>Cood v. Cood</i> (1864), 33 L.J. Ch. 273	128
<i>Cooke's Trusts, In re</i> (1887), 3 T.L.R. 558	47, 131
<i>Cooper v. Cooper</i> , [1891] P. 369	325, 326
<i>Cooper v. Cooper</i> (1888), 13 App. Cas. 88	47, 48, 131 , 132
<i>Cooper v. The Earl of Waldegrave</i> (1840), 2 Beav. 282	368
<i>Cooper-King v. Cooper-King</i> , [1900] P. 65	375
<i>Copin v. Adamson</i> (1875), 1 Ex. D. 17	389
<i>Coppin v. Coppin</i> (1725), 2 P. Wms. 291	24, 169, 242
<i>Corbett v. Waddell</i> 7 (1879), R. (Ct. of Sess.) 200	130
<i>Craig, In re</i> (1916), 86 L.J. Ch. 62	259
<i>Cranstown v. Johnston</i> (1796), 3 Ves. Sen. 170	175, 179
<i>Craven's Estate</i> (No. 1), <i>In re</i> , [1937] 1 Ch. 431	190
<i>Crichton's Trust, In re</i> (1855), 24 L.T. (O.S.) 267	289
<i>Crompton v. Bearcroft</i> (1769), 2 Hagg. Cons. 444	302
<i>Cruh v. Cruh</i> (1945), 62 T.L.R. 16	77, 79
<i>Cunnington, In re</i> , [1924] 1 Ch. 68	236
<i>Curtis v. Hutton</i> (1808), 14 Ves. 537	170
<i>Curwen v. Milburn</i> (1889), 42 Ch. D. 424	370
<i>Cust v. Goring</i> (1854), 18 Beav. 383	41
<i>Cutcliffe's Will Trusts, In re</i> , [1939] 1 Ch. 565, 571; [1940] 2 All E.R. 297	40, 230
<i>D., In re</i> , [1943] 1 Ch. 305, 306	287, 288
<i>Daimler Co. Ltd. v. Continental Tyre, etc.</i> , [1916] 2 A.C. 307; 85 L.J.K.B. 1333	337, 353 , 406, 407
<i>Dalrymple v. Dalrymple</i> (1811), 2 Hagg. Con. 54	3, 9, 302
<i>Davidson's Settlement Trusts, In re</i> (1873), L.R. 15 Eq. 383	254, 414
<i>Dawson, In re</i> , [1915] 1 Ch. 626	170
<i>Dawson v. Jay</i> (1854), 3 De G.M. & G. 764	286
<i>Debtor, In re a</i> , [1922] 2 Ch. 470; [1929] 1 Ch. 362	252, 256
<i>De Béeche v. South American Stores Ltd. and Chilean Stores Ltd.</i> , [1935] A.C. 148	123, 375, 376
<i>De Beers Consolidated Mines Ltd. v. Howe</i> , [1906] A.C. 455	347, 348
<i>De Bernalles v. New York Herald</i> , [1893] 2 Q.B. 97n	396
<i>De Bonneval v. De Bonneval</i> (1838), 1 Curt. 854	82
<i>De Cosse Brissac v. Rathbone</i> (1861), 6 H. & N. 301	426
<i>D'Este's Settlement Trusts, In re</i> , [1903] 1 Ch. 898	238
<i>De Gasquet James</i> (Countess) v. Duke of Mecklenburg-Schwerin, [1914] P. 53	332
<i>D'Huart v. Harkness</i> (1865), 34 Beav. 324	237
<i>De La Vega v. Vianna</i> (1830), 1 B. & Ad. 284	357, 360
<i>De la Chaumette v. The Bank of England</i> (1831), 2 B. & Ad. 385	133, 140
<i>De Linden, In re</i> , [1897] 1 Ch. 453	273
<i>Delphin v. Robins</i> (1859), 7 H.L. Cas. 390	85
<i>De Massa v. De Massa</i> , [1939] 2 All E.R. 150	310
<i>De Montaigu v. De Montaigu</i> , [1913] P. 154	86, 317
<i>De Nicols v. Curlier</i> , [1900] A.C. 21	241, 249, 250, 251
<i>De Nicols v. Curlier No. 2</i> , [1900] 2 Ch. 410	178, 179
<i>De Reneville v. De Reneville</i> , [1947] P. 168; (1948), 64 T.L.R. 82	6, 34,
	85, 296, 299, 322 , 326, 328, 374
<i>De Savini v. Lousada</i> (1870), 18 W.R. 425	287, 288
<i>Deschamps v. Miller</i> , [1908] 1 Ch. 856	172, 174
<i>Desmare v. United States</i> , 93 U.S. 605	71
<i>Dewhurst, In re; Flowers v. Dewhurst</i> (1948), 64 T.L.R. 74	322

TABLE OF CASES

XXXV

	PAGE
De Wilton, <i>In re</i> , [1900] 2 Ch. 481	47, 307
Dickinson v. Del Solar, [1930] 1 K.B. 376	412
Dicks v. Dicks, [1899] P. 275	332
Dictator, The, [1892] P. 304	399, 400
Didisheim v. London & Westminster Bank, [1900] 2 Ch. 15	273
Di Fernando v. Simon, Smits & Co., [1920] 2 K.B. 704; [1920] 3 K.B. 409	368, 369
Dobree v. Napier (1836), 2 Bing (N.C.) 781	153, 156
Dobson v. Festi, Rasini & Co., [1891] 2 Q.B. 92	360, 361
Doe, d. Birtwhistle v. Vardill, see Birtwhistle v. Vardill	
Doe, d. Seebkristo v. East India Co. (1856), 10 Moo. 140	169
Doetsch, <i>In re</i> , Matheson & Ludwig, [1896] 2 Ch. 836	361
Don v. Lippmann (1837), 5 Cl. & F. 1	357, 360, 362, 370
Don's Estate, <i>Re</i> (1857), 4 Drewry 194	275
Dost Aly Khan, In the Goods of (1880), 6 P.D. 6	375
Doucet v. Geoghegan (1878), 9 Ch. D. 441	68
Doulson v. Mathews (1792), 4 T.R. 503	166
Dowds, In the Estate of, [1948] W.N. 146	221
Drevon v. Drevon (1864), 34 L.J. Ch. 129	77
Drexel v. Drexel, [1916] 1 Ch. 251	392
Drooge v. Snart (see also <i>sub nom. Karnah, The</i>)	126
Drummond v. Drummond (mentioned in Brodie v. Barrie (1813) 2 V. & B. 132)	41
Duchess d'Orléans, In the Goods of H.R.H. The (1859), 1 Sw. & Tr. 253	222
Duchess Dowager Buccleugh v. Hoare (1819), 4 Madd. 467	41
Duchess of Kingston's Case (1776), 2 Sm. L.C. 754	432, 433
Duff Development Co. Ltd. v. Government of Kelantan, [1924] A.C. 797	411
Dulaney v. Merry & Son, [1901] 1 K.B. 536	184
Duncan v. Cannan (1854), 18 Beav. 128	247
Duncan v. Lawson (1889), 41 Ch. D. 394	170, 171, 242, 377
Dundas v. Dundas (1830), 2 D. & C. 349	242, 245
Dunlop Pneumatic Tyre Co. v. A.G. für Motor-und Motorfahrzeugbau, [1902] K.B. 342	351
Dupleix, The, [1912] P. 8	389, 390, 400
Dupont v. Quebec S.S. Co., [1897] Q.R. 11 S.C. 188	151
Dutch West India Co. v. Henriques (1724), 1 St. 612	344
Dynamit A.G. v. Rio Tinto Co., [1918] A.C. 260.	50, 61, 374
Earl, In the Goods of (1867), L.R. 1 P. & D. 450	222
Earl Nelson v. Lord Bridport (1846), 8 Beav. 547	162, 180, 215, 216
Earl of Winchelsea v. Garety (1837), 2 Keen 293	244
East India Co. v. Elkins (1718), 2 Brown P.C. 382	368
Easterbrook v. Easterbrook (1943), 60 T.L.R. 80	322
Edelstein v. Schuler & Co., [1902] 2 K.B. 144	133
Egbert v. Short, [1907] 2 Ch. 205	401, 403
Egyptian Delta Land & Investment Co. v. Todd, [1929] A.C. 1; [1928] 44 T.L.R. 747	337, 349, 350
Egyptian Hotels Ltd. v. Mitchell, [1915] A.C. 1022	348
Eichengruen v. Mond, [1940] 3 All E.R. 148	405
Ellerman Lines Ltd. v. Read, [1928] 2 K.B. 144	401, 434, 435
Ellinger v. Guinness, Mahon & Co., [1939] 4 All E.R. 16	396, 397
Elliot v. Lord Joicey, [1925] A.C. 209	373
Ellis v. McHenry (1871), L.R. 6 C.P. 228	265, 267, 430, 432
Emanuel v. Symon, [1908] 1 K.B. 302	385, 387, 388, 422
Embricos v. Anglo-Austrian Bank, [1904] 2 K.B. 870; [1905] 1 K.B. 677	133, 134, 137, 138, 139, 185, 188, 196
Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co., [1927] A.C. 95	340, 351
Engelke v. Musmann, [1928] A.C. 433; (1928), 97 L.J.K.B. 789	412
Enohin v. Wylie (1862), 10 H.L.Cas. 1	220, 224, 255
Erie Beach Co. Ltd. v. A.G. for Ontario, [1930] A.C. 161	208
Ertel Bieber & Co. v. Rio Tinto Co., Ltd., [1918] A.C. 260.	404

Esposito v. Bowden (1857), 7 E. & B. 763	404
Eustace v. Eustace, [1924] P. 45	329
Evans, <i>In re</i> ; National Provincial Bank, Ltd. v. Evans, [1947] 1 Ch. 695	71, 72, 75
Evans v. Burrell (1859), 28 L.J. (P. M. & A.) 82	218
Ewing v. Orr-Ewing (1883), 9 App. Cas. 34; (1885), 10 App. Cas. 453	2, 28, 180, 217, 220, 223
Eyre v. Countess of Shaftesbury (1722), 2 P. Wms. 103	286
Fagerness, The, [1927] P. 311	378, 399
Fasbender v. A.G., [1922] 1 Ch. 232; [1922] 2 Ch. 850	76
Fauntleroy v. Lum, 210, U.S. 230	63
Feist v. Société Intercommunale Belge d'Electricité, [1934] A.C. 161	101, 120
Fenton v. Livingstone (1859), 3 Macq. 497	416
Ferguson v. Spencer (1840), 1 M. & G. 987	265
Ferguson's Trusts, <i>In re</i> (1874), W.R. 762	289
Fergusson's Will, <i>In re</i> , [1902] 1 Ch. 483	236
Finska Angfartygs A/B v. Baring Brothers and Co. Ltd. (1937), 54 T.L.R.	147; [1938] 61 Ll. L.R. 257; [1940] 1 All E.R. 20
Firebrace v. Firebrace (1878), L.R. 4 P.D. 63	202, 210, 211
Fisher v. Bridges (1854), 3 E. & B. 640	332
Fittock, <i>In the Goods of</i> (1863), 32 L.J. P. M. & A. 157	437
Fitzgerald, <i>In re</i> , [1904] 1 Ch. 573	218
Folliot v. Ogden (1789), 1 H. Bl. 123; (1790), 3 T.R. 726	41, 103, 130, 131, 248
Forbes v. Cochran (1824), 2 B. & C. 448	24, 54, 55, 59
Forbes v. Forbes (1854), 23 L.J. Ch. 724	63
Ford v. Cotesworth (1870), L.R. 5 Q.B. 544	68
Forsyth v. Forsyth (1948), 64 T.L.R. 17	123
Foster v. Driscoll, [1929] 1 K.B. 470	123
Francke & Rasch, <i>In re</i> , [1918] 1 Ch. 470	53, 123
Frankfurter v. W. L. Exner, Ltd., [1947] 1 Ch. 629	120, 141
Frankman v. Anglo-Prague Bank, [1948] 1 All E.R. 339	56, 57, 58
Freeman v. East India Co. (1822), 5 B. & Ald. 617	122, 123
Freke v. Lord Carbery (1873), L.R. 16 Eq. 461	188, 192, 195
Fritz Schultz Co. v. Raines Co. (1917), 164 N.Y. Sup. 454	42, 170, 242
	337, 354
<i>Gastano and Maria</i> , The (1882), 7 P.D. 137	126
Galbraith v. Grimshaw, [1910] A.C. 508	256, 260
Galene v. Galene, [1939] P. 237	310
Gally, <i>In the Goods of</i> (1876), 1 P.D. 438	230
Gambier v. Gambier (1835), 7 Sim. 263	289
Garnier, <i>In re</i> (1872), L.R. 13 Eq. 532	273
Gasque v. Inland Revenue Commissioners, [1940] 2 K.B. 80	345, 346, 347
Gavin Gibson & Co. Ltd. v. Gibson, [1913] 3 K.B. 379	387
Geiringer v. Swiss Bank Corp., [1940] 1 All E.R. 406	404
Gemma, The, [1899] P. 285	400
General Steam Navigation Co. v. Guillou (1843), 11 M. & W. 877	48, 335, 360
George Monro, Ltd. v. American Cyanamid & Chemical Corp., (1944), 60 T.L.R. 265	390, 391, 396
Geyer v. Aguilar (1798), 7 T.R. 681	24
Gibbs v. Fremont (1853), 9 Ex. 25	368
Gibbs & Sons v. Société Industrielle et Commerciale des Métaux (1890), 25 Q.B.D. 399	266, 267
Gibson v. Holland (1865), L.R. 1 C.P. 1	365
Gillespie, <i>In re</i> (1886), 18 Q.B.D. 286	133
Glenroy, The, [1945] A.C. 124	353
Godard v. Gray (1870), L.R. 6 Q.B. 139	418, 430, 431
Goerz & Co. v. Bell, [1904] 2 K.B. 136	348
Golaa, Thé, [1926] P. 103	166
Goodman's Trusts, <i>In re</i> (1881), 17 Ch. D. 266	274, 275, 281, 282

TABLE OF CASES

xxxvii

	PAGE
Goodwin v. Roberts (1875), L.R. 10 Exch. 337	133
Gorely, <i>Ex parte</i> (1864), De G. J. & S. 477	239
Gould v. Gould, [1892] P. 240	315
Graham v. Graham, [1923] P. 31	328, 330, 331
Grange v. Grange, [1892] P. 245	320
Grant v. Easton (1883), 13 Q.B.D. 302	418
Grassi, <i>In re</i> , [1905] 1 Ch. 584	169, 170, 230, 231
Graumann v. Treitel, [1940] 2 All E.R. 188	125, 369, 388
Great West Saddlery Co. Ltd. v. R., [1921] 2 A.C. 91	344
Green v. Green, [1893] P. 89	315
Green v. Green, [1929] P. 101	281
Green, <i>In re</i> (1909), 25 T.L.R. 222	302
Grell v. Levy (1864), 16 C.B. (N.S.) 73	61
Grey's Trusts, <i>In re</i> , [1892] 3 Ch. 88	282
Grimwood v. Bartels (1877), 46 L.J. Ch. 788	273
Groos, <i>In re</i> , [1915] 1 Ch. 572	233, 234, 250
Groos, <i>In the Estate of</i> , [1904] P. 269	240, 241
Grove, <i>In re</i> , (1889), 40 Ch. D. 216	276, 282
Groves v. Wimborne, [1898] 2 Q.B. 402	418
Guaranty Trust Co. of New York v. Hannay, [1915] 2 K.B. 536	43, 134, 136, 137, 374, 384
Guepratte v. Young (1851), De G. & Sm. 217	113, 114
Guiard v. De Clermont, [1914] 3 K.B. 145	423, 426
Guinness v. Miller, (1923), 291 Fed. 769	146
H. v. H., [1928] P. 206	317
Hadad v. Bruce (1892), 8 T.L.R. 409	393
Haddok v. Haddok (1906), 201 U.S. 562	318
Hadley v. Baxendale (1854), 9 Exch. 341	98
Hagen, The, [1908] P. 189	391
Haile Selassie v. Cable & Wireless Ltd. (No. 1), [1938] Ch. 839; (No. 2), [1939] 1 Ch. 182	55, 60, 409
Hall v. Odber (1809), 11 East 118	415
Halley, The (1868), L.R. 2 P.C. 193	154
Hamlyn & Co. v. Talisker Distillery, [1894] A.C. 202	101, 103, 107, 110, 122
Harris v. Quine (1869), L.R. 4 Q.B. 653	370, 371
Harris v. Taylor, [1915] 2 K.B. 580	423, 424, 425
Harrison v. Storry (1809), 5 Cranch. 289	361, 362
Harrop v. Harrop, [1920] 3 K.B. 386	427, 429
Harvey v. Farnie (1880), 5 P.D. 153; (1882) 8 App. Cas. 43	315, 316
Hatch's Will Trusts, <i>In re</i> ; Public Trustee v Hatch (10th June, 1948)	407
Hawthorne, <i>In re</i> (1883), 23 Ch. D. 743	166, 174
Hay v. Northcote, [1900] 2 Ch. 262	306
Hayward, <i>In re</i> , [1897] 1 Ch. 905	254
Heathfield v. Chilton (1767), 4 Burr. 2016	24
Hellfeld v. Rechnitzer & Mayer Frères & Co., [1914] 1 Ch. 748	42, 361, 398
Hellmann's Will, <i>In re</i> (1866), L.R. 2 Eq. 363	48, 228, 289
Henderson, <i>In re</i> , <i>Nouvion v. Freeman</i> (1887), 37 Ch. D. 244; (1889), 15 App. Cas. 1	415, 418, 419, 427, 428
Henderson v. Henderson (1844), 6 Q.B. 288	420, 428, 430
Henriques v. Dutch West India Co. (1730), 2 Ld. Ray. 1535	344
Hepworth, <i>In re</i> , [1930] 1 Ch. 750	281
Herd v. Herd, [1936] P. 205	86, 317
Heriz v. Riera (1840), 11 Sim. 318	123
Hernando, <i>In re</i> (1884), 27 Ch. D. 284	242
Hewitt v. Hewitt, <i>Re</i> (1918), 43 Dom. L.R. 716	115
Hicks v. Powell (1869), L.R. 4 Ch. 741	169, 172
Hilckes, <i>ex parte</i> Muhesa Rubber Plantations Ltd., [1917] 1 K.B. 48	353
Hill, <i>In the Goods of</i> (1870), L.R. 2 P. & D. 89	221
Hill v. Crock (1873), L.R. 6 H.L. 265	284
Hilton v. Guyot (1895), 159 U.S. 113	416

Hirschfeld v. Smith (1866), L.R. 1 C.P. 340	141, 142
Hobbs v. Australian Press Association, [1933] 1 K.B. 1	361, 398
Hodgson v. De Beauchesne (1858), 12 Moo. P.C. 285	74
Holden, <i>In re</i> , [1935] W.N. 52	224
Holland v. Bennett, [1902] 1 K.B. 867	395
Holman v. Johnson (1775), 1 Cowp. 341	53
Holmes, <i>Re</i> (1861), 2 J. & H. 527	166
Hooper v. Gumm (1867), L.R. 2 Ch. App. 282	9, 188, 195
Hope v. Hope (1854), 4 De G.M. & G. 328; (1857), 8 De G.M. & G. 731	61, 287, 288
Horne v. Rouquette (1878), 3 Q.B.D. 514	141, 142
Hoskins v. Matthews (1855), 8 De G. M. & G. 13	77, 78, 81
Hoyles, <i>In re</i> , [1911] 1 Ch. 179	35, 38, 40, 42, 171
Hoystead v. Commissioner of Taxation, [1926] A.C. 155	432
Huber v. Steiner (1835), 2 Bing. N.C. 202	357, 370, 371
Hume Pipe & Concrete Construction Co. v. Moracrete, [1942] 1 K.B. 189	392
Hummel v. Hummel, [1898] 1 Ch. 642	237
Hunter v. Potts (1791), 4 T.R. 182	23, 264
Huntington v. Attrill, [1893] A.C. 150	43, 54, 437
Hussein v. Hussein, [1938] P. 161	325
Hutter v. Hutter, [1944] P. 95	322, 328
Hyde v. Hyde (1866), L.R. 1 P. & D. 130	36, 37, 277, 291, 293
Hyman v. Hyman, [1929] P. 1, 30	315
Ilderton v. Ilderton (1793), 2 H. Bl. 145	302
Imrie v. Castrique (1860), 8 C.B. 405; (see also <i>sub nom.</i> Castrique v. Imrie)	431
Indian and General Investment Trust Ltd. v. Borax Consolidated Ltd., [1920] 1 K.B. 539	54
Indian Chief, The (1800), 3 C. Rob. 12	71
Industrie, The, [1894] P. 58	127
Ingall v. Moran (1944), 60 T.L.R. 120	218
Inglis v. Robertson, [1898] A.C. 616	188, 191, 194, 196, 197
Inglis v. Usherwood (1801), 1 East 515	188, 189, 190, 195
Inland Revenue Commissioners v. Lysaght, [1928] A.C. 234	347
International Trustee v. R., [1936] 3 All E.R. 407; see also R. v. International Trustee	123
Inverclyde v. Inverclyde, [1931] P. 29	322, 324
Ithaka, The, [1939] 3 All E.R. 630	401
Jacobs v. Crédit Lyonnais (1884), 12 Q.B.D. 589	101, 102, 103, 105, 107, 118, 119
Jacobson v. Frachon (1928), 138 L.T. 386	420, 434, 435
James v. James (1881), 50 L.J. P.D.A. 24	304
James M'Gee, The, (1924), 300 Fed. 93	146
Janson v. Driefontein Consolidated Mines, [1902] A.C. 484	404, 407
Jay v. Budd (1897), 77 L.T. 335	388
Jeannot v. Fuerst (1909), 25 T.L.R. 424	428
Jerningham v. Herbert (1829), 4 Russ 388	41
Johnson, <i>Re</i> , [1903] 1 Ch. 821	23, 96, 97
Johnson v. Taylor Bros. & Co. (1919), 36 T.L.R. 62; [1920] A.C. 144	388, 390, 391, 394, 395, 396, 397
Johnstone v. Baker (1817), 4 Madd. 474	41
Johnstone v. Beattie (1843), 10 Cl. & F. 40	81, 287, 289
Johnstone v. Bucknall, [1898] 2 I.R. 499	439
Jollet v. Deponthieu (1769), 1 H. Bl. 132	257, 259
Jones, <i>Re</i> Estates, (1921), 182 N.W. 227; 16 A.L.R. 1286	71
Jones v. Oceanic Steam Navigation Company Ltd., [1924] 2 K.B. 730	125
Jones v. Scottish Accident Insurance Co. (1886), 17 Q.B.D. 421	352
Jopp v. Wood (1865), 4 De G. J. & S. 616; (1865), 34 L.J. Ch. 212	76, 77, 83
Judgment Debtor, <i>Re</i> a (No. 2176 of 1938), [1939] Ch. 601	439, 443
Jupiter (No. 3), The, [1927] P. 122	56, 57, 191, 340

TABLE OF CASES

xxxix

PAGE

Kadel Chajkin, Ltd. v. Mitchell Coutts & Co. (1948), 64 T.L.R. 89	102, 103, 127
Kahler v. Midland Bank, Ltd., [1948] 1 All E.R. 811	122, 123
Kaleten, The, (1914), 30 T.L.R. 572	399
Karnah, The, (1869), L.R. 2 P.C. 505	126
Kaufmann v. Gerson, [1904] A.C. 591	61
Kelly v. Selwyn, [1905] 2 Ch. 117	204, 208
Kent v. Atkinson, [1923] P. 142	321
Kent v. Burgess (1840), 11 Sim. 361	303, 304
Ker v. Wauchope (1819), 1 Bligh 1	244
Khoo Hooi Leong v. Khoo Hean Kwee, [1926] A.C. 529	276
Kildare v. Eustace (1686), 2 Cas. in Ch. 188	180
Kirk v. Kirk, [1947] 2 All E.R. 118	333
Kirwan's Trusts, <i>In re</i> (1883), 25 Ch. D. 373	237
Kleinwort Sons & Co. v. Ungarische Baumwolle (1939), 108 L.J. K.B. 861	10, 49, 106, 109, 122
Kloebe, <i>In re</i> (1884), 28 Ch. D. 175	224, 244
Koehlin et Cie v. Kestenbaum Bros., [1927] 1 K.B. 889	133, 136, 137, 138, 139, 140
Kohn v. Rinson & Stafford (Brod), Ltd., [1948] 1 K.B. 327	441
Korvine's Trusts, <i>In re</i> , [1921] 1 Ch. 343	43, 190
Kotia v. Nahas, [1941] A.C. 403	90, 92
Krauss v. Krauss (1916), 35 T.L.R. 637	406
Kroch v. Rossell et Co., [1937] 1 All E.R. 725	390, 391, 396
Kursell v. Timber Operators & Contractors, [1927] 1 K.B. 298	123
Lacroix, <i>In the Goods of</i> (1877), 2 P.D. 94	229
Lalandia, The (1932), 49 T.L.R. 69	352
Lanckester v. Lanckester, [1925] P. 114	315, 316
Lashley v. Hog (1804), 4 Paton 581	250
La Virginie (1804), 5 Rob. Adm. 98	74
Lawson's Trusts, <i>In re</i> , [1896] 1 Ch. 175	254
Lazard Brothers v. Banque Industrielle de Moscou, [1932] 1 K.B. 617	340
Lazard Brothers & Co. v. Midland Bank, [1933] A.C. 289	334, 335, 339, 340
Lebel v. Tucker (1867), L.R. 3 Q.B. 77	134, 140
Lecouturier v. Rey, [1910] A.C. 262	56, 57, 58
Ledeboter (N.V.) and Van Der Held's Textielhandel v. Hilbert, [1947] 1 K.B. 964	404
Lee v. Abdy (1886), 17 Q.B.D. 309	202, 212
Leguia, <i>In the Estate of</i> , [1934] P. 80	222
Leman's Will Trusts, <i>In re</i> (1945), 61 T.L.R. 566	274
Le Mesurier v. Le Mesurier, [1895] A.C. 517	312, 314, 316, 322, 330
Lenders v. Anderson (1883), 12 Q.B.D. 50	390
Leon, The (1881), 6 P.D. 148	157
Leroux v. Brown (1852), 12 C.B. 801	113, 364, 365
Levene v. Inland Revenue Commissioners, [1928] A.C. 217, 225	347
Lewal's Settlement Trusts, <i>In re</i> , [1918] 2 Ch. 391	238
Liddel-Grainger's Will Trusts, <i>In re</i> (1936), 53 T.L.R. 12	75, 77, 80
Liddel's Settlement Trusts, <i>In re</i> , [1936] Ch. 365	173, 286, 288, 387, 392
Lightbody v. West (1903), 88 L.T. 484	305
Limerick v. Limerick (1863), 32 L.J.P.M.A. 92	304
Linden, von, <i>In the Goods of</i> , [1896] P. 148	222
Linke v. Van Aerde (1894), 10 T.L.R. 426	325, 326, 327
Littauer Glove Corporation v. F. W. Millington (1920) Ltd. (1928), 44 T.L.R. 746	352
Liverpool, Brazil and River Plate Steam Navigation Ltd. v. Benham; see the <i>Halley</i> .	
Liverpool & Great Western Steam Co. v. Phoenix Insurance Co. (1889), 129 U.S. 397	125
Liverpool Marine Credit Co. v. Hunter (1867), L.R. 4 Eq. 62; (1868), L.R. 3 Ch. 479	188, 193, 416

Lloyd v. Guibert (1865), L.R. 1 Q.B. 115	99, 101, 103, 118, 126 , 128, 157
Lloyd Royal Belge v. Louis Dreyfus & Co. (1927), 27 Ll. L.R. 288	369
Logan v. Bank of Scotland (No. 2), [1906] 1 K.B. 141	401, 402, 403
Login v. Princess Victoria Gouramma of Coorg (1862), 30 Beav. 632	377
London & Brazilian Bank v. Maguire (1895), 8 Q.R.C.S. 358	137
London, Chatham & Dover Ry. v. South Eastern Ry. Co., [1893] A.C. 429	367
Lord Advocate v. Jaffrey, [1921] 1 A.C. 146	314
Lord Chesham, <i>In re</i> (1886), 31 Ch. D. 466	245
Lorentzen v. Lydden & Co. Ltd. (1942), 58 T.L.R. 178, 180	59
Lorillard, <i>In re</i> , [1922] 2 Ch. 638	224, 225
Luccioni v. Luccioni, [1943] 1 All E.R. 260	405
Luck's Settlement Trusts, <i>Re</i> , [1940] 1 Ch. 323; 864	268, 269, 272, 275, 276, 280, 282, 284, 285 , 286
Luther v. Sagor, see <i>sub nom.</i> Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.	
Lyne's Settlement Trusts, <i>In re</i> , [1919] 1 Ch. 80	40 , 169, 230
Macartney, <i>In re</i> , Macfarlane v. Macartney, [1921] 1 Ch. 522	63, 427, 429, 437
Macartney v. Garbutt (1890), 24 Q.B.D. 368	412
McCulloch, <i>ex parte</i> (1880), 14 Ch. D. 716	256, 261
McCullum v. Smith (1838), Meigs 342 (Tenn); 33 A.D. 147	42
Macdonald v. Macdonald (1872), L.R. 14 Eq. 60	233
M'Elmoyle v. Cohen (1839), 13 Pet. 312	415
Macfadyen, P. & Co., <i>In re</i> , [1908] 1 K.B. 675	261
M'Feetridge v. Stewarts & Lloyds Ltd., [1913] S.C. 773	112
Machado v. Fontes, [1897] 2 Q.B. 231	62, 150 , 151, 152, 367, 368
McHenry v. Lewis (1882), 22 Ch. D. 397	401, 402
Mackenzie, <i>In re</i> , [1911] 1 Ch. 578	85
Mackie v. Darling (1871), L.R. 12 Eq. 319	289
McMillan v. Canadian Northern Railway, [1923] A.C. 120	150, 151 , 152
Madeleine Vionnet et Cie v. Wills, [1940] 1 K.B. 12	369
Madrid, The, [1927] P. 40, 45	351
Magdalena Steam Navigation Co. v. Martin (1859), 2 E. & E. 94	412
Male v. Roberts (1800), 3 Esp. 163	112 , 374
Manners, <i>In re</i> , [1923] 1 Ch. 220	374
Manners v. Pearson, [1898] 1 Ch. 581	368
Maraver, <i>In the Goods of</i> (1828), 1 Hagg. Ecc. 498	228
Maritime Insurance Co. Ltd. v. Assecuranz-Union von 1865 (1935), 52 Ll. L.R. 16; 52 Ll. L.R. 16	103, 110, 117, 122
Marlborough (Duke) v. A.G., [1945] 1 Ch. 78	103, 130, 235, 247, 248
Marseilles Extension Railway & Land Company, <i>In re</i> (1885), 30 Ch. D. 598	105, 106, 114, 137
Marshall v. Critico (1808), 9 East 447	412
Martin, <i>In re</i> , Loustalan v. Loustalan, [1900] P. 211	43, 73, 75, 77, 80, 82 , 130, 241
Martin v. Martin (1831), 2 R. & M. 507	175
Martin v. Stout, [1925] A.C. 359	395
Mary Moxham, The, see <i>sub nom.</i> Moxham, Mary, The.	
Massey v. Heynes (1888), 21 Q.B.D. 330	397
Matheson Bros. Ltd., <i>Re</i> (1884), 27 Ch. D. 225	340
Maude v. Inland Revenue Commissioners, [1940] 1 All E.R. 464	209
Maudslay, <i>In re</i> , [1900] 1 Ch. 602	210
May v. May and Lehmann, [1943] 2 All E.R. 146	83
Mayor, Aldermen & Citizens of Canterbury v. Wyburn & The Melbourne Hospital, [1895] A.C. 89	171
Mehta v. Mehta, [1945] 2 All E.R. 690	37, 292, 293
Melan v. Duke of Fitzjames (1797), 1 Bos. & P. 138	357
Melbourn, <i>ex parte</i> (1870), L.R. 6 Ch. 64	261, 357, 362

TABLE OF CASES

xli

PAGE

Mercantile Investment & General Trust Company v. River Plate Trust Loan & Agency Company, [1892] 2 Ch. 303	175, 176
Messimy v. The Registry (1887) (Court of Cassation, France) <i>Chunet</i> 815 ; <i>Beale Cases</i> , Vol. II, 6	42
Messina v. Petrococcchino (1872), L.R. 4 P.C. 144	416, 430
Mette v. Mette (1859), 1 Sw. & Tr. 416	296
Mezger v. Mezger, [1937] P. 19	319, 333
Meyer v. Dresser (1864), 16 C.B. (N.S.) 646	360
Meyer v. Dreyfuss et Cie, [1940] 4 All E.R. 157	405
Middleton v. Janverin (1802), 2 Hagg. Cons. 437	302
Middleton's Settlement, <i>In re</i> , [1947] Ch. 583	208
Mighell v. The Sultan of Johore, [1894] 1 Q.B. 149	57, 409, 411
Milford, The (1858), Swab. 362	362
Miller v. Ewer (1847), 27 Maine 509, 46 A.D. 619	337
Minna Craig Steamship Co. v. Chartered Mercantile Bank of India, London and China, [1897] 1 Q.B. 460	427
Mir-Awaruddin's Case, see <i>sub nom.</i> R. v. Superintendent Registrar of Marriages, Hammersmith, <i>ex parte</i> Mir-Anwaruddin.	
Missouri Steamship Company, <i>In re</i> (1889), 42 Ch. D. 321	103, 105, 110, 118, 120, 125, 126
Mitford v. Mitford, [1923] P. 130	295, 296, 325, 326, 327
Mollikien v. Pratt (1878), 125 Mass. 374 ; <i>Lorenzen</i> 283	48
Monaco v. Monaco, <i>The Times</i> , 23rd March, 1937	287, 288
Monro, George, Ltd. v. American Cyanamid Corp., see <i>sub nom.</i> George Monro, Ltd. v. American Cyanamid & Chemical Corp.	
Montaigu v. Montaigu, see <i>sub nom.</i> De Montaigu v. De Montaigu.	
Montgomery v. Zarifi (1919), 88 L.J.P.C. 20	247
Mostyn v. Fabrigas (1775), 1 Cowp. 161	153
Moultrie v. Hunt (1861), 23 N.Y. 394.	238
Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society Ltd., [1937] 4 All E.R. 206 ; [1938] A.C. 224	41, 56, 107, 379
Moxham, Mary, The (1876), 1 P.D. 43, 107	149, 150, 156, 157, 158, 165, 390
Muller & Co.'s Margarine Ltd. v. Commissioners of Inland Revenue, [1901] A.C. 217	207
Municipal Council of Sydney v. Bull, [1909] 1 K.B. 7	53, 166
Munro v. Munro (1840), 7 Cl. & F. 842	74
Murray v. Champenowne, [1901] 2 L.R. 232	39
Musurus, In the Estate of, [1936] 2 All E.R. 1666	226, 227
Musurus Bey v. Gadban, [1894] 1 Q.B. 533	412, 413
Mutzenbecher v. La Aseguradora Española, [1906] 1 K.B. 254	395
Naamloose Vennotschap Handelsmaatschappij Wokar, <i>In re</i> (1946), 174 L.T. 101	340
Nachimson v. Nachimson, [1930] P. 217	36, 37, 38, 277, 297, 314, 319
Napoleon Bonaparte, In the matter of the Will and Codicils of late Emperor (1853), 2 Rob. Ecc. 606	80
Nat. v. Coons (1847), 10 Miss. 543	238
National Mortgage and Agency Company of New Zealand v. Gosselin (1922), 38 T.L.R. 832	391, 394
Nautik, The, [1895] P. 121	399
Nelson v. Bridport: see Earl Nelson v. Lord Bridport	
Newbattle, The (1885), 10 P.D. 33	411
Newbould v. A.G., [1931] P. 75	322
New Brunswick Railway Co. v. British & French Trust Corporation, [1939] A.C. 1	121
Newby v. von Oppen (1872), 7 Q.B. 293	351
New York Breweries Co. v. A.G., [1899] A.C. 62	223
New York Life Insurance Co. v. Public Trustee, [1924] 2 Ch. 101	206, 207, 208, 209

	PAGE
New York Security & Trust Co. v. Keyser, [1901] 1 Ch. 666	273
New Zealand Shipping Co. Ltd. v. Thew (1925), 8 Tax Cas. 208	348
Niboyet v. Niboyet (1878), 4 P.D. 1 268, 272, 295, 312, 314, 315, 322	
Nigel Gold Mining Co. Ltd. v. Hoade, [1901] 2 K.B. 849	407
Njegos, The, [1936] P. 90	127
Norris, Re (1888), 5 Morrell 111	392
Norris v. Chambres (1861), 29 Beav. 246; (1861), 3 De G.F. & J. 583	175, 176
North v. North (1936), 52 T.L.R. 380	366
North Western Bank v. Poynter, [1895] A.C. 56	191, 192
Norton v. Florence Land & Public Work Co. (1877), 7 Ch. D. 332	169, 175
Norton's Settlement, In re, [1908] 1 Ch. 471	403
Nouvelle Banque de l'Union v. Ayton (1891), 7 T.L.R. 377	374
Nugent v. Vetzera (1866), L.R. 2 Eq. 104	287, 288
Oakes v. Turguand (1867), L.R. 2 H.L. (Eng. & Ir.) 325	42
Oceanic Steam Navigation Company Ltd. v. Mellor (1913), 233 U.S. 718	158
Ochsenbein v. Papelier (1873), 8 Ch. App. 695	434, 436
Oetjen v. Central Leather Co. (1917), 246 U.S. 297	57
Ogden v. Ogden, [1908] P. 46 48, 295, 297, 300, 304, 308, 309, 310, 325, 326	
O'Keefe, Re, [1940] 1 All E.R. 216; [1940] 1 Ch. 124	29, 96
Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag, [1914] 1 K.B. 715	351, 352
Ontario (Treasurer of) v. Aberdein, [1947] A.C. 24	208
Ontario (Treasurer of) v. Blonde, [1947] A.C. 24	208
Oppenheimer v. Louis Rosenthal & Co., A.G., [1937] 1 All E.R. 23	391, 395
Paine, In re, [1940] 1 Ch. 46	297
Pamia, The (1943), 112 L.J.P.D.A. 34	353
Papadopoulos v. Papadopoulos, [1930] P. 55	302
Pardo v. Bingham (1868), L.R. 6 Eq. 485	362
Parkinson v. Potter (1885), 16 Q.B.D. 152	412
Parlement Belge, The (1880), L.R. 5 P.D. 197	409
Pastre v. Pastre, [1930] P. 80	319, 333
Peat's Trusts, In re (1869), L.R. 7 Eq. 302	172
Pélégryn v. Coutts & Co., [1915] 1 Ch. 696	273
Pemberton v. Hughes, [1899] 1 Ch. 781 319, 420, 421, 422, 430	
Peninsular & Oriental Steam Navigation Co. v. Shand (1865), 3 Moo. P.C. (N.S.) 272 102, 103, 110, 119	
Penn v. Lord Baltimore (1750), 1 Ves. Sen. 444 24, 162, 163, 173, 175, 177, 178, 180	
Pepin v. Bruyère, [1900] 2 Ch. 504	169, 242
Perrin v. Perrin, [1914] P. 135	332
Pertreus v. Tondear (1790), 1 Hagg. Cons. 136	306
Peruvian Guano Co. v. Bockwoldt (1883), 23 Ch. D. 225	401
Peyrae v. Wilkinson, [1924] 2 K.B. 166	369
Philipps v. Batho (1913), L.J. 82 K.B.D. 882	321
Philipps v. Hunter (1791), 4 T.R. 187	264
Philipps v. Eyre (1869), L.R. 4 Q.B. 225; (1870), 6 Q.B. 1 146, 148, 149, 150, 153	
Phillips v. Phillips (1921), 38 T.L.R. 150	304
Philpotts v. Reed (1819), 1 Br. & Bing. 294	265
Pickering v. Stephenson (1872), L.R. 14 Eq. 322	339
Piercy, In re, [1895] 1 Ch. 83	180
Pike v. Hoare (1763), 2 Ed. 182	169, 242
Pillans v. Van Mierop (1765), 3 Burr 1663	116
Pipon v. Pipon (1744), Amb. 25 24, 183, 184, 226, 227	
Pitt v. Lord Dacre (1876), 3 Ch. D. 295	172
Pollard, Ex parte (1840), Mont. & Ch. 239	173, 176
Polydore v. Prince (1837), Ware 402	48
Polzeath, The, [1916] P. 117	353
Porter v. Freudenberg, [1915] 1 K.B. 857	388, 406
Porto Alexandre, The, [1920] P. 30	60, 410

TABLE OF CASES

xliii

PAGE

Pottinger v. Wightman (1817), 3 Mer. 67	86, 87
Power v. Whitmore (1815), 4 M. & S. 141	416
Poyser v. Minors (1881), 7 Q.B.D. 329	358
Price, <i>In re</i> , [1900] 1 Ch. 442	235, 236, 237
Price v. Dewhurst (1837), 8 Sim. 279	419, 420
Priest, <i>In re</i> , [1944] 1 Ch. 58	229, 231
Princess Bariatinski, <i>Re</i> (1843), 1 Ph. 375	273
Princess Paley Olga v. Weisz, [1929] 1 K.B. 718	57
Princess Thurn and Taxis v. Moffit, [1915] 1 Ch. 58	406
Printing & Numerical Registering Co. v. Sampson (1875), L.R. 19 Eq. 462	98
Pymont Ltd. v. Schott, [1939] A.C. 145	120

Queensland Mercantile & Agency Co., <i>In re</i> , [1891] 1 Ch. 536; [1892] 1 Ch. 219	28, 208, 209
---	--------------

Raeburn v. Andrews (1874), L.R. 9 Q.B. 118	441
Raeburn v. Raeburn (1928), 44 T.L.R. 384	329, 330, 331
Raffenel, <i>In the Goods of</i> (1863), 3 Sw. & Tr. 49	76
Ralli Brothers v. Compañía Naviera Sota y Aznar, [1920] 1 K.B. 614	103, 120, 123
Ramsay v. Liverpool Royal Infirmary, [1930] A.C. 597	67, 69, 75, 77, 78
Rann v. Hughes (1778), 7 T.R. 350	116
Ratcliff v. Ratcliff (1859), 1 Sw. & Tr. 467	315
Rayment v. Rayment, [1910] P. 271	320, 321
Rea, <i>In re</i> , Rea v. Rea, [1902] 1 I.R. 451	242
Reid, <i>In the Goods of</i> (1866), L.R. 1 P.D. 74	241
Rein v. Stein, [1892] 1 Q.B. 753	394
Republica de Guatemala v. Nuñez (1926), 42 T.L.R. 625; (1927), 1 K.B. 669	113, 116, 182, 198, 201, 202, 203, 206, 207, 210, 211
R. v. A.B., [1941] 1 K.B. 454	411, 412
R. v. Anderson (1868), L.R. 1 C.C.R. 161	156
R. v. Bottrill; <i>Ex parte</i> Kuechenmeister, [1947] 1 K.B. 45	404, 406
R. v. Hammer, [1923] 2 K.B. 786	374
R. v. Home Secretary; <i>Ex parte</i> L., [1945] 1 K.B. 7	406
R. v. Humphreys, [1914] 3 K.B. 1237	275
R. v. International Trustee, [1937] A.C. 500	100, 101, 102, 103, 107, 111, 118, 120, 121, 128, 385
R. v. Keyn (1876), 2 Ex. D. 63	156
R. v. Lesley (1860), 8 Cox. C.C. 269	156
R. v. Lovitt, [1912] A.C. 212	209
R. v. Millis (1844), 10 Cl. & F. 534	304
R. v. Naguib, [1917] 1 K.B. 359	293
R. v. The Superintendent Registrar of Marriages, Hammersmith; <i>Ex parte</i> Mir-Anwaruddin, [1917] 1 K.B. 641	6, 36, 291, 292, 320
Richardo v. Garcias (1845), 12 Cl. & F. 368	430
Risdon Iron and Locomotive Works v. Furness, [1906] 1 K.B. 49	343, 345
Roach v. Garvan (1748), 1 Ves. Sen. 157	325
Roberts, <i>Ex parte</i> (1886), 18 Q.B.D. 286	133
Roberdeau v. Rous (1738), 1 Atk. 543	166, 180
Robert v. Robert (1947), 63 T.L.R. 343	294, 322, 327
Roberts v. Brennan, [1902] P. 143	327, 328
Robins v. Robins, [1907] 2 K.B. 13	429
Robinson, <i>Ex parte</i> (1883), 22 Ch. D. 816	256
Robinson & Co. v. Continental Insurance Co. of Mannheim, [1915] 1 K.B. 155	405
Robinson v. Bland (1760), 2 Burr. 1077	100, 368
Robinson v. Fenner, [1913] 3 K.B. 835	419, 420
Roche v. MacDonald (1927), 275 U.S. 449	63
Rodriguez v. Speyer Brothers (1919), 88 L.J.K.B. 147	404
Roper, <i>In re</i> (deceased), [1927] N.Z.L.R. 731	234
Rosenthal v. Alderton & Sons, Ltd., [1946] 1 K.B. 374	369

	PAGE
Rosler v. Hilbery, [1925] 1 Ch. 250	391, 396
Ross, Ross v. Waterfield, <i>In re</i> , [1930] 1 Ch. 377	89, 90, 92, 93, 94, 96, 97, 160
Ross v. Ross (1880), 129 Mass. 243	112
Ross v. Ross, [1930] A.C. 1	80
Rothschild v. Currie (1841), 1 Q.B. 43	141, 142
Rouquette v. Overmann (1875), L.R. 10 Q.B. 525	141
Rousillon v. Rousillon (1880), 14 Ch. 351	61, 387
Row v. Jagg, [1911] 1 Ch. 185	40, 42
Royal Exchange Assurance Corporation v. Sjørorsakrings Aktiebolaget Vega, [1902] 2 K.B. 384	103, 117
Rucker, <i>Ex parte</i> (1834), 3 D. & Ch. 704	42
Rudd v. Rudd, [1924] P. 72	420
Ruding v. Smith (1821), 2 Hagg. Cons. 371	303, 304
Rush v. Rush, [1920] P. 242	321
Russell, The Trial of Earl, [1901] A.C. 446	315
Russell & Co. Ltd. v. Cayzer, [1916] 2 A.C. 298	388, 397
Russell v. Smyth (1842), 2 M. & W. 810	418
Russian Bank for Foreign Trade, <i>In re</i> , [1933] 1 Ch. 745	339, 340, 341
Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse, [1923] 2 K.B. 630; [1925] A.C. 112	335, 339, 340, 341
Russian & English Bank, <i>In re</i> , [1932] 1 Ch. 663	339, 340, 341
Russian & English Bank and Florance Montefiore Guedalla v. Baring Brothers & Co. Ltd., [1936] A.C. 405	335, 339, 340, 341, 342
Sabatier v. Trading Co., [1927] 1 Ch. 495	340
Saccharin Corp. Ltd. v. Chemische Fabrik von Heyden A.G., [1911] 2 K.B. 516	352
Sachs v. Miklos, [1948] 1 All E.R. 67	369
Sadler v. Robins (1808), 1 Camp. 253	428, 429
Salpetre Case, The (1607), 12 Co. Rep. 12	59
Salvesen v. Administrator of Austrian Property, [1927] A.C. 641	269, 294, 296, 312, 324, 325
Sanders v. Maclean (1883), 11 Q.B.D. 327	196
Sanders v. St. Helens Smelting Co. Ltd. (1906), 39 Nova Scotia Reports 370	137, 138
Santos v. Illidge (1860), 8 C.B. (N.S.) 861	63
Sasson v. Sasson, [1924] A.C. 1007	316, 320
Sassoon & Co. v. Graham & Co. and Oriental Navigation Co. (1925), 133 L.T.R. 805	394
Savini v. Lousada (1870), 18 W.R. 425	287, 288
Saxby v. Fulton, [1909] 2 K.B. 208	125
Schaffenius v. Goldberg, [1916] 1 K.B. 284	406
Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag, [1946] A.C. 219	404
Schibbsy v. Westenholz (1870), L.R. 6 Q.B. 155	382, 386, 387, 388, 389, 416, 418
Schnapper, <i>Re</i> , [1928] Ch. 420	228
Scholefield, <i>In re</i> , [1905] 2 Ch. 408	238
Schulhof, In the Goods of (1948), 64 T.L.R. 46	221, 363
Scott, <i>re</i> (1874), 22 W.R. 748	273
Scott v. Pilkington (1862), 2 B. & S. 11	428
Scrimshire v. Scrimshire (1752), 2 Hagg. Con. 395	23, 24, 52, 291, 302, 325
Seagrove v. Parks, [1891] 1 Q.B. 551	388
Security Trust Co. v. Dodd Mead & Co. (1899), 173 U.S. 624	257
Sedgwick Collins & Co. v. Rossia Insurance Co. of Petrograd, [1926] 1 K.B. 1	56
Seedat's Executors v. The Master, [1917] A.D. 302	277
Selkrig v. Davies (1814), 2 Dow 230	262, 263
Selot's Trust, <i>In re</i> , [1902] 1 Ch. 488	271
Serbian and Brazilian Loans, Case concerning the payment of, (1929) Publications of the Permanent Court of International Justice, Series A, Nos. 20/21	121

TABLE OF CASES

xlv

	PAGE
Sharpe v. Crispin (1869), L.R.I.P. & D. 611	88
Shaw v. Gould (1865), L.R. 1 Eq. 247 (<i>sub nom. In re Wilson's Trusts</i>); (1868), L.R. 3 H.L. 55	275, 278, 279, 280, 315, 436
Shedden v. Patrick (1854), 1 Macq. H.L. 535	284
Sibeth, <i>Ex parte</i> (1885), 14 Q.B.D. 417	248
Sidaway v. Hay (1824), 3 B. & C. 12	265
Sill v. Worswick (1791), 1 H. Bl. 665	24, 183, 184, 257, 259, 263
Sim v. Sim, [1944] P. 87	76, 328, 330, 331
Simonin v. Mallac (1860), 2 Sw. & Tr. 67; (1860), 29 L.J.P.M.A. 97	47, 300, 302, 308, 309, 310, 325, 326
Simpson, Coutts & Co. v. Church Missionary Society, <i>In re</i> , [1916] 1 Ch. 502	237, 238
Simpson v. Fogo (1862), 1 Hem. & Mil. 195	160, 182, 193, 195
Sinha's (Lord) Claim, H.L. Jour., 1939, Vol. 171, p. 350	37, 278, 292
Sinnott v. Bowden, [1912] 2 Ch. 414	239
Sirdar Gurdial Singh v. Rajah of Faridkote, [1894] A.C. 670	52, 379, 386
Skinner v. East India Company (1667), 6 St. Tr. 710	166
Slater v. Mexican National Railway (1904), 194 U.S. 120	146, 152, 359
Smelting Co. of Australia Ltd. v. Commissioners of Inland Revenue, [1897] 1 Q.B. 175	202
Smith, <i>In re</i> , [1913] 2 Ch. 216	244
Smith, <i>In re</i> , Lawrence v. Kitson, [1916] 2 Ch. 206	128
Smith v. Smith, [1947] 2 All E.R. 741	322
Smith v. Weguelin (1869), L.R. 8 Eq. 198	409
Société Générale de Paris v. Dreyfus Brothers (1885), 29 Ch. D. 239; (1887), 37 Ch. D. 215	391
Society for the Propagation of the Gospel v. Wheeler (1814), 2 Gallison 105	337
Solomons v. Ross (1764), 1 H. Bl. 131 note	256, 257, 259
Sommersett's Case (1772), 20 St. Tr. 1	23, 24, 63
Somerville v. Somerville (1801), 5 Ves. 750	227
Sottomaior, <i>In re</i> (1874), L.R. 9 Ch. App. 677	273
Sottomayor v. De Barros (No. 1) (1877), 2 P.D. 81; (1877), 3 P.D. 1	47, 301, 308, 310
Sottomayor v. De Barros (No. 2) (1879), 5 P.D. 94	48, 63, 111, 294, 297, 301, 308, 310
South African Breweries Ltd. v. King, [1899] 2 Ch. 173	102, 103, 110
South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord, [1898] 1 Ch. 190	411
Southcot, <i>Ex parte</i> (1751), 2 Ves. Sen. 401	273
Sovfracht v. Gebr. van Udens Scheepvaart en Agentuur Maatschappij, [1943] A.C. 203	353, 405, 407
Spenceley, In the Goods of, [1892] P. 255	221
Spivack v. Spivack (1930), 99 L.J.P.D.A. 52	311, 320
Spurrier v. La Cloche (1902), A.C. 446	103, 122
Srini Vasan v. Srini Vasan [1946] P. 67	37, 269, 270, 290, 292, 293
St. Pierre v. South American Stores (Gath & Chaves) Ltd., [1936] 1 K.B. 382	166, 173, 178, 402
Stahlwerk Becker Aktiengesellschaft's Patent, <i>In re</i> , [1917] 2 Ch. 272	405
Stark, <i>In re</i> (1850), 2 Mac. & G. 174	273
Stathatos v. Stathatos, [1913] P. 46	86, 317
Stein v. Valkenhuysen (1858), E.B. & E. 65	389
Stirling, <i>In re</i> , [1908] 2 Ch. 344	279
Stirling-Maxwell v. Cartwright (1879), 11 Ch. D. 522	224
Stuart v. Bute (1861), 9 H.L. Cas. 440	3, 286, 287, 288
Studd v. Cook (1883), 8 App. Cas. 577	236, 243
Suarez, <i>In re</i> , [1918] 1 Ch. 176	412
Submarine Telegraph Co. v. Dickson (1864), 15 C.B. (N.S.) 759	157, 158
Sugden v. Lord St. Leonards (1876), 1 P.D. 154	199
Sussex Peerage Case, (1844), 11 Cl. & F. 85	298, 307, 375
Sutherland v. Administrator of German Property (1933), 50 T.L.R. 107	207

	PAGE
Swedish Central Railway Co. v. Thompson, [1925] A.C. 495	849, 350
Swiss Bank Corporation v. Boehmische Industrial Bank, [1923] 1 K.B. 673	208
Sydney Municipal Council v. Bull, [1909] 1 K.B. 7	53, 54, 166
Szalatnay-Stacho v. Fink, [1947] 1 K.B. 1	144
<i>Tagus</i> , The, [1903] P. 44	362
Tallack v. Tallack, [1927] P. 211	52, 379, 383, 385, 423, 425
Tallmadge, <i>Re</i> (1919), 109 Misc. 696; 181 N.Y.S. 336; Lorenzen's Leading Cases, 834	92
Tamplin (F.A.) Steamship Co. v. Anglo-Mexican Petroleum Products Co. Ltd., [1916] 2 A.C. 397	98
Taylor, Hockley v. O'Neal, <i>In re</i> , [1925] Ch. 739	284
Taylor v. Best (1854), 14 C.B. 487	412
Taylor v. Caldwell (1863), 3 B. & S. 826	98
Temple, <i>In re</i> ; <i>ex parte</i> Official Receiver v. Official Assignee of Bombay, [1947] 1 Ch. 345	261
Thames and Mersey Marine Insurance Company v. Società di Navigazione a Vapore del Lloyd Austriaco (1914), 30 T.L.R. 475	352
Tharsis Sulphur & Copper Co. Ltd. v. Société des Métaux (1889), 58 L.J.Q.B. 435	389
Thompson v. Ketcham (1811), 8 Johns. (N.Y.) 189	112
Thornton v. Curling (1824), 8 Sim. 310	233, 234
Thurnburn v. Steward (1871), L.R. 3 P.C. 478	262
Toller v. Carteret (1705), 2 Vern 494	180
Tolten, The (1946) 175 L.T. 469; [1946] P. 135 149, 156, 163, 166, 379, 399	110
Torni, The, [1932] P. 27, 78	207
Toronto General Trusts Corporation v. The King, [1919] A.C. 679	227, 340, 351
Tovarishstvo Manufaktur Ludvig Rabenek, <i>In re</i> (1944), 60 T.L.R. 467	137
Trimbey v. Vignier (1834), 1 Bing. (N.C.) 151	235, 236, 243, 245
Trotter v. Trotter (1828), 4 Bligh (N.S.) 502	157
<i>Tubantia</i> , The, [1924] P. 78	218, 219
Tucker, <i>In the Goods of</i> (1864), 34 L.J.P.M. & A. 29	353
<i>Tudno</i> , St. The, [1916] P. 291	344
Tugate v. Austrian Lloyd's (1858), 4 C.B. (N.S.) 704	401
Turk Gemi Kurtama v. Ithaka (Owners), [1939] 3 All E.R. 630	382, 386, 421
Turnbull v. Walker (1892), 67 L.T. 767	296, 315, 324
Turner v. Thompson (1887), 13 P.D. 37	409
Twycross v. Dreyfuss (1877), 5 Ch. D. 605, 616	
Udny v. Udny (1869), L.R. 1 Sc. & Div. 441	28, 47, 49, 65, 66, 71, 72, 77, 268, 282
Ullee, <i>In re</i> (1885), 53 L.T. 711	288
United States v. Fox (1876) 94 U.S. 315	167, 168
Usparicha v. Nobbe (1811), 13 East 332	406
U.S.S.R. v. Belaiew (1925), 134 L.T. 64	411
Vadala v. Lawes (1890), 25 Q.B.D. 310	62, 434, 436
Valier v. Valier (1925), 133 L.T. 830	325, 327
Vandyke v. Adams, [1942] 1 Ch. 155	405, 407
Van Grutten v. Digby (1862), 31 Beav. 561; (1862), 32 L.J. Ch. 179	115, 131, 248
Vanquelin v. Bouard (1863), 15 C.B. (N.S.) 341	223, 421
Vavasseur v. Krupp (1878), 9 Ch. D. 351	409
Viditz v. O'Hagan, [1899] 2 Ch. 569; [1900] 2 Ch. 87	114, 132
<i>Virginia</i> , La (1804), 4 Paton 581; 5 Rob. Adm. 99	74
Visser, H.M. The Queen of Holland (Married Woman) v. Drukker & others, <i>In re</i> , [1928] 1 Ch. 877	53
Vita Food Products v. Unus Shipping Co., [1939] A.C. 277	108, 110, 125

TABLE OF CASES

xlvii

PAGE

Voinet v. Barrett (1885), 55 L.J., Q.B. 39	419, 423, 426
<i>Volturmo</i> , The, [1921] 2 A.C. 544	368
Von Hellfeld v. E. Rechnitzer and Mayer Frères & Co., [1914] 1 Ch. 748	42, 361, 398
Von Linden, In the Goods of, [1896] P. 148	222
Wadsworth v. Queen of Spain (1851), 17 Q.B. 171	409
Wahl v. A.G. (1932), 147 T.L.R. 382	75, 77, 79, 80
Wakely v. Triumph Cycle Co., [1924] 1 K.B. 214	439
Walker, <i>In re</i> , [1908] 1 Ch. 560	237
Walpole v. Canadian Northern Railway, [1923] A.C. 113	148, 150, 151, 152
Ward v. Ward (1923), 39 T.L.R. 440	331
Warner Brothers Pictures, Inc. v. Nelson, [1937] 1 K.B. 209	379
Warrender v. Warrender (1835), 2 Cl. & F. 488	9, 85, 241, 296, 302, 315, 416
Waterhouse v. Reid, [1938] 1 K.B. 743	393
Waterhouse v. Stansfield (1851), 9 Hare 234; (1852), 10 Hare 254	167, 168, 169
Watkins v. North American Land & Timber Co. Ltd., [1904] 20 T.L.R. 534	389
Watson, <i>In re</i> , [1893] 1 Q.B. 21	440
Watson & Sons v. <i>Daily Record</i> (Glasgow) Ltd., [1907] 1 K.B. 853	391, 396
Watts v. Shrimpton (1855), 21 Beav. 97	131, 248
Waugh v. Morris (1873), L.R. 8 Q.B. 202	123
Welch v. Tennent, [1891] A.C. 639	249
Wellington (Duke), <i>In re</i> ; Glentanar v. Wellington, [1947] 1 Ch. 506; [1948] 1 Ch. 118	89, 90, 92, 93, 95, 97, 376
Whicker v. Hume (1858), 7 H. L. Cas. 124	68, 233
White v. White, [1937] P. 111	85, 297, 326, 327, 328
Whitelegg, In the Goods of, [1899] P. 267	375
Wilkins v. Wilkins, [1896] P. 108	329
Wilkinson's Settlement, <i>In re</i> , Butler v. Wilkinson, [1917] 1 Ch. 620	237, 238
Wilks, <i>In re</i> , [1935] 1 Ch. 645	217, 223
Williams, <i>In re</i> (1873), 8 Ch. App. 690	392
Williams v. Colonial Bank (1888), 38 Ch. D. 388; see also Colonial Bank v. Cady and Williams	208
Williams v. Jones (1845), 13 M. & W. 628	418
Williams v. Wheeler (1860), 8 C.B. (N.S.) 299	365
Williamson v. Osenton (1914), 232 U.S. 619	67
Willoughby, <i>In re</i> (1885), L.R. 30 Ch. D. 324	287
Willyams v. Bullmore (1863), 33 L.J. Ch. 461	61
Wilson, <i>Ex parte</i> (1872), 7 Ch. App. 490	262, 263
Wilson v. Wilson (1872), L.R. 2 P. & D. 435	311, 314, 315
Wilson v. Wilson, [1903] P. 157	375
Wilson's Trusts, <i>In re</i> (1865), L.R. 1 Eq. 247 (see also <i>sub nom.</i> Shaw v. Gould)	279
Wilton, <i>In re</i> , [1900] 2 Ch. 481, 492	47, 307
Winans v. A.G., [1904] A.C. 287	68, 74, 75, 77, 78
Winchelsea v. Garety (see Earl of Winchelsea v. Garety).	
Winter v. Winter, [1894] 1 Ch. 421	393
Witted v. Galbraith, [1893] 1 Q.B. 577	397
Wokar, see <i>sub nom.</i> Naamloose Vennotschap Handelsmaatschappij Wokar, <i>In re</i>	
Wolf, In the Goods of (1948), 64 T.L.R. 46	221, 363
Wolfenden v. Wolfenden, [1946] P. 61	304
Woodland v. Woodland, [1928] P. 169	312
Worcester City & County Banking Co. v. Firbank, Pauling & Co., [1894] 1 Q.B. 784	398
Worms v. De Valdor (1880), 49 L.J. Ch. D. 261	271
Wotherspoon v. Conolly (1871), 9 Macph. Ct. of Sess. 510	439
Wright's Trusts, <i>In re</i> (1856), 2 K. & J. 595	282
X's Settlement, <i>In re</i> , [1945] Ch. 44	286, 288

	PAGE
<i>Yates v. Thomson</i> (1835), 3 Cl. & F. 544	236, 363
<i>Yearbook Case</i> (1303), 30-1 Edw. I (R.S.) 492	21
<i>Yelverton v. Yelverton</i> (1859), 1 Sw. Tr. 574	332
<i>Yorke v. British & Continental Steamship Co. Ltd.</i> (1945), 78 Ll.L.R. 181 56, 379	
<i>Yorkshire Tannery and Boot Manufactory Ltd. v. Eglinton Chemical Co. Ltd.</i> (1884), 54 L.J. Ch. 81	397
<i>Young v. Clarey</i> (1948), 64 T.L.R. 93.	172
<i>Yukon Consolidated Gold Corporation Ltd. v. Clark</i> , [1938] 2 K.B. 241 ; [1937] 2 All E.R. 343	442
<i>Zigurds, The</i> , [1932] P. 113	362

ABBREVIATIONS

A. BOOKS

- American Restatement* = *American Law Institute, Restatement of the Law of Conflict of Laws*, 1934.
- Beale = *The Conflict of Laws*, by J. H. Beale, 1935.
- Beale, Cases = *Cases on the Conflict of Laws*, by J. H. Beale, 2nd ed., 1928.
- Cheshire = *Private International Law*, by G. C. Cheshire, 3rd ed., 1947.
- Dicey = *A Digest of the Law of England with reference to the Conflict of Laws*, by A. V. Dicey, 5th ed., by A. Berriedale Keith, 1932.
- Falconbridge = *Essays on the Conflict of Laws*, by J. D. Falconbridge, Toronto, 1947.
- Foote = *A Concise Treatise on Private International Law*, by J. A. Foote, 5th ed., by Hugh H. L. Bellot, 1925.
- Goodrich = *Handbook on the Conflict of Laws*, by H. F. Goodrich, University of Michigan.
- Lorenzen = *Cases on the Conflict of Laws*, by Ernest G. Lorenzen, 2nd ed., 1924.
- Minor = *Conflict of Laws ; or Private International Law*, by Raleigh C. Minor, 1901.
- Phillimore = *Commentaries upon International Law*, by Sir Robert Phillimore, 3rd ed., 1879.
- Westlake = *A Treatise on Private International Law*, by John Westlake, 7th ed., by Norman Bentwich, 1925.
- Wolff, M. = *Private International Law*, by Martin Wolff, 1945.

B. PERIODICALS

- B.Y.B.I.L.* = *British Year Book of International Law*.
- Cam. L.J.* = *Cambridge Law Journal*.
- Clunet* = *Journal du droit international*.
- Col.L.Rev.* = *Columbia Law Review*.
- Har.L.Rev.* = *Harvard Law Review*.
- J.Comp.Leg.* = *Journal of Comparative Legislation and International Law*.
- L.Q.R.* = *Law Quarterly Review*.
- Mod.L.R.* = *Modern Law Review*.
- Recueil* = *Recueil des cours de l'Académie de Droit International*.

A TEXTBOOK OF THE ENGLISH CONFLICT OF LAWS

PART I: INTRODUCTION

CHAPTER I

SUBJECT-MATTER OF THE CONFLICT OF LAWS *

I. THE CONFLICT OF LAWS ARISES FROM THE EXISTENCE OF DIFFERENT LEGAL UNITS

1. WHAT IS A LEGAL UNIT?

The branch of law known as the conflict of laws owes its existence to the fact that different systems of law prevail in different parts of the world. Every territory which is governed by a body of law "separate and distinct from the law of any other territorial unit" ¹ is a legal unit. The boundaries of a legal unit often coincide with those of a political unit (usually called a state), as, e.g., in the case of France. Sometimes, however, different parts of the same political unit represent separate legal units. Thus, England and Scotland, though part of the United Kingdom of Great Britain, are separate legal units—a fact well known to everybody acquainted with the differences between the laws of these two countries. Similarly, in the United States of America, every state represents a separate legal unit.² As regards the Dominion of Canada, the Privy Council, in a case on appeal from that Dominion,³ was concerned with the question whether, with respect to the acquisition of a matrimonial domicile, the Dominion as such or every Province within the Dominion formed a separate legal unit. The Privy Council examined the matrimonial laws prevailing in the Dominion, and came to the conclusion that ⁴—

unity of law in respect of the matters which depend on domicile does not at present extend to the Dominion. The rights of the respective spouses in this litigation, therefore, cannot be dealt with on the

*For further reading: D. J. Llewelyn Davies, "Règles générales de conflits de lois," in *Recueil des cours de l'Académie de Droit International*, 1938; W. E. Beckett, "International Law in England," 55 *L.Q.R.* (1939), 257; W. W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, Harvard University Press, 1942.

¹ American *Restatement*, para. 2; see also Falconbridge, 223.

² 1 Beale 16.

³ *A.G. for Alberta v. Cook*, [1926] A.C. 444.

⁴ At p. 450.

footing that they have a common domicile in Canada, but must be determined upon the footing of the rights of the parties and the remedies available to them under the municipal laws of one or other of the Provinces.

Since it would be possible to map out the whole world according to the different legal units into which it is divided, the conflict of laws has been rightly described by Professor Beale as the branch of law dealing "primarily with the application of laws in space."¹

2. THE CONFLICT OF LAWS (PRIVATE INTERNATIONAL LAW) AND THE LAW OF NATIONS (PUBLIC INTERNATIONAL LAW).

The fact that the conflict of laws arises from the existence, not of different sovereign states, but of different legal units, demonstrates clearly the fundamental distinction between the two provinces of law called the conflict of laws (private international law) and the law of nations (public international law). The law of nations, which is defined by Oppenheim² as

the body of customary and conventional rules which are considered legally binding by civilised states in their intercourse with each other,

is concerned with political units, while the conflict of laws relates to legal units. Further, only sovereign states can, in general, be subjects of the law of nations, whereas the conflict of laws deals principally with the rights and duties of private persons. Thirdly, the law of nations is truly international in character, being a code of behaviour which though still deficient in compulsive force, is, by common consent, accepted by all members of the family of nations for their intercourse with each other. The rules pertaining to the conflict of laws, on the other hand, are not of international character, but (as will be explained later) form part of the national law of a country and are enforceable in the same manner as the rules of any other branch of law prevailing in that country. In view of these facts, the misleading name "private international law" should be avoided for our subject,³ and preference should be given to the term "conflict of laws" which, though also not quite accurate, "has been made familiar to Anglo-American ears

¹ 1 Beale, i.

² *International Law*, 6th ed., 1947, Vol. I, p. 4.

³ "The phrase 'private international law' is liable to be misunderstood . . . no law binding *proprio vigore* upon any independent state can be established by generalisation from the jurisprudence of other nations." Earl Selborne in *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 513. The expression "conflict of laws" is used in the Bills of Exchange Act, 1882, title of Sect. 72. It is significant that Professor Cheshire, who favours the expression "private international law," uses the traditional term when referring to the treatment of the subject by the Courts (3rd ed., p. 829).

by Story's great book, and by the later works of Wharton, Dicey, . . . Minor,"¹ and, it may be added, Professor Beale.

3. THE PROVINCE OF THE CONFLICT OF LAWS.

Legal relationships may exist between persons living in different legal units. An Englishman may marry a Scotswoman, an English wine merchant may purchase port wine from a Portuguese exporter, an Australian may inherit an English estate, an English company may own oilfields in Iran, and so on. Legal relationships extending over several legal units, while pertaining to different provinces of the law (e.g., to the law of marriage, of contract, of succession, or of property) have one feature in common, viz. they invariably exhibit a "foreign complexion,"² meaning thereby a connection with a legal unit other than the one whose courts are asked to adjudicate upon the issue. Here, the distinction between "municipal law" and "foreign law" (which will frequently recur in the following pages) should be noted. Municipal law is the law of the legal unit to which the court or lawyer dealing with the dispute is attached, whilst, from the point of view of that court or lawyer, the laws of all other legal units are foreign law. In the English courts, English law is the municipal system of law while the laws of Scotland,³ New Zealand, or China are alike foreign laws.

In cases extending over several legal units a peculiar problem may arise from the fact that each of two contending parties may correctly assert that his claim is well founded "in law," but whereas one party refers to the law of one legal unit, the other refers to that of a different legal unit. For instance, reverting to our illustrations above, in a dispute between an Englishman and a Scotswoman concerning the validity of their marriage, the Englishman may, on the footing of English law, rightly contend that the marriage is invalid, whilst the Scotswoman, on the footing of Scots law, may truly claim that the marriage is valid.⁴ Again, in a dispute between an English wine merchant and a Portuguese exporter concerning the interpretation of their contract, the English wine merchant may be entitled to judgment if the contract were to be construed by English law, while the Portuguese exporter would be successful if the contract were to be construed by the law of Portugal. The peculiar problem frequently arising in cases extending over several legal units is the question as to which law is applicable to the issue, or, as it is shortly termed, the question

¹ 1 Beale 15.

² Baty, *Polarized Law*, p. 148.

³ *Stuart v. Bute* (1861), 9 H.L. Cas. 440, 454.

⁴ See *Dalrymple v. Dalrymple* (1811), 2 Hagg. Con. 54.

of the choice of law. To provide an answer to this question is the principal task of the rules of the body of law called the conflict of laws.

II. DEFINITION OF THE CONFLICT OF LAWS

We are now able to define the subject-matter of our investigation. *The conflict of laws is that branch of the municipal system of law which, in disputes extending over several legal units, determines*

(a) *which law is applicable to the issue, or*

(b) *which court has jurisdiction to adjudicate upon the issue.*

This statement requires elucidation in three directions.

1. THE CONFLICT OF LAWS IS PART OF THE MUNICIPAL LAW.

First, the conflict of laws forms part of the municipal law of a legal unit. This follows from the fact that all law prevailing within a territory derives its force and authority from the sovereign power under whose dominion the territory is. The sovereign power is the exclusive "fountain of justice" in its territory and, with respect to the source of law, it is immaterial whether the political unit under the jurisdiction of that sovereign power consists of a single legal unit, or (by the will of the sovereign) of several legal units. The principle of territorial sovereignty which is firmly established in English law¹ leads logically and inevitably to the conclusion that the conflict of laws is part and parcel of the municipal system of law.

The territorial character² of our subject-matter provides a safe starting point for the solution of problems pertaining to the conflict of laws, and permits the deduction of the rules of that province of law from the relevant principles of cognate branches of municipal law.³

The view that the conflict of laws is part of the municipal system of law explains further the conspicuous discrepancy existing in many respects between the various national systems of conflict of laws, e.g., between the English and French conflict of laws. It would be erroneous to assume that all national systems of conflict of laws provide identical, or at least similar rules for the solution of the problem of the application of law in space. Thus, the question frequently arises as to which law shall determine the personal status of an individual

¹ Chap. XV, p. 378, *post*, and *Chung Chi Cheung v. R.* (1938), 55 T.L.R. 184, 187.

² The view explained in the context represents the teaching of the school of jurisprudence called the territorial school whose teaching is in contrast to the doctrine of the international school; see p. 27, *post*, and Llewelyn Davies, *loc. cit.*, p. 24.

³ E.g., in English law the deduction of the proper law of contract from the general principles of the law of contract, p. 98, *post*.

(e.g., his or her legitimacy). The English and American¹ systems of conflict of laws alike consider the law of domicile of the individual as competent to determine his personal status, in preference to other criteria, such as his nationality. The French, Italian and German systems of conflict of laws, on the other hand, provide a solution of the same problem on the basis of the nationality of the individual, his domicile being regarded as immaterial. Not only in these elementary aspects, but also in numerous other more technical problems, are the systems of conflict of laws in different legal units at variance. Our investigation is concerned with the *English* conflict of laws, and pays only passing attention to other systems of conflict of laws.²

2. THE CONFLICT OF LAWS IS CONCERNED WITH DISPUTES EXTENDING OVER SEVERAL LEGAL UNITS.

Secondly, the conflict of laws deals with disputes extending over several legal units. A sovereign may admit, in a single legal unit under his jurisdiction, different systems of personal law which may occasionally conflict with the general law of the country (or even with each other). Thus, shortly after the Conquest, the personal laws of the English and Normans were in some respects different,³ and in the Middle Ages there was occasionally friction between the Common Law and Canon law.⁴ To-day the main example of the existence, within the same legal unit, of different personal systems of law arises in the case of the laws of the different religious communities, e.g., in England the respective laws of the established Protestant Church and the Roman Catholic Church. Discrepancies within a legal unit between these personal laws and the general law of the country⁵ do not appertain to the province of the conflict of laws because they do not arise from the application of law in space.

Sometimes, however, the law of a legal unit expressly incorporates to some extent the law of a religious community. Thus, in India and Pakistan, the validity of a marriage between Hindus or questions of succession as regards Hindus are governed by Hindu law⁶ whilst the

¹ Although in the United States of America every state is a separate legal unit, uniformity of law exists with respect to various legal problems. It is, in so far, customary to use the expression "American" law.

² For a comparative investigation into the different systems of the conflict of laws, see E. Rabel, *The Conflict of Laws, A Comparative Study*, Chicago, Vol. I, 1945 and Vol. II, 1948, and "An Interim Account on Comparative Conflicts Law," 46 *Michigan Law Review*, 1948, p. 625; Arthur K. Kuhn, *Comparative Commentaries on Private International Law*, New York, 1937; M. Wolff, *Private International Law*, London, 1945; A. Nussbaum, *Principles of Private International Law*, New York, 1943.

³ See p. 20, *post*.

⁴ See p. 20, *post*.

⁵ See e.g. *In re Coats's Trusts; Coats v. Gilmour* (1948), 64 T.L.R. 193.

⁶ D. F. Mulla, *Principles of Hindu Law*, 10th ed., 1946, p. 2.

same questions arising with respect to Mohammedans are subject to Mohammedan law.¹ Further, in Greece, foreigners are permitted to celebrate a marriage in the form prescribed by their own personal law ; "this rule permits all sorts of religious and consular marriages."² If in these cases the personal legal system which has been embodied in the territorial law of the respective legal unit, conflicts with the law of another legal unit, e.g., if Mohammedan Law as applicable to a Mohammedan in Pakistan conflicts with English law,³ a true conflict of laws in space ensues, and the case falls within the province of our subject.⁴

3. THE CONFLICT OF LAWS DETERMINES THE LAW APPLICABLE TO THE ISSUE AND THE JURISDICTION OF THE COURTS.

Thirdly, the conflict of laws determines—

(a) which law is applicable to the issue, or

(b) which court has jurisdiction to adjudicate upon the issue.

Of these two problems, the second pertains to the law of procedure and practice and will be examined in detail in the last three chapters of this treatise. Logically, the question of jurisdiction arises prior to the question of the law applicable to the matter in issue, and for this reason want of jurisdiction is in the English courts usually pleaded by way of a preliminary objection in point of law.⁵

The first problem, i.e., the question of the choice of law, is the central problem of our subject. It arises, as has been seen,⁶ in legal disputes extending over several legal units, and is identical with the problem of connecting the issue of a legal dispute with the law of a particular territory. In every dispute extending over several legal units some facts surrounding the case suggest an association of the issues with one legal unit while other facts point to different directions.

¹ D. F. Mulla, *Principles of Mohammedan Law*, 12th ed., 1946, pp. 2-3.

² Rabel, *loc. cit.*, Vol. I, p. 218. The learned author continues : "excluding however, simple consensual contracts of the Common Law or Soviet type."

³ *R. v. The Superintendent Registrar of Marriages, Hammersmith, Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634.

⁴ During the second World War the British Parliament authorised the application of their respective disciplinary laws to members of certain foreign Forces stationed in Great Britain. The Allied Forces Act, 1940, e.g., was made applicable to the Dutch Forces in Great Britain ; *In re Amand (No. 1)*, [1941] 2 K.B. 239 ; *In re Amand (No. 2)*, [1942] 1 K.B. 445. Under the United States of America (Visiting Forces) Act, 1942, criminal jurisdiction over members of the United States Forces in the United Kingdom was left to American courts martial. Under the Allied Powers (Maritime Courts) Act, 1941, Dutch and Norwegian Maritime Courts were set up which were empowered to exercise criminal jurisdiction on British soil over specified classes of their nationals.

⁵ Under Order XXV r. 2 : *Companhia de Moçambique v. British South Africa Company*, [1892] 2 Q.B. 358 ; *De Reneville v. De Reneville*, (1948), 64 T.L.R. 82.

⁶ P. 3, *ante*.

The rules of our subject lay down which of the surrounding facts, as compared with the others, are to prevail and to link up the issue with a territorial law.

The issues with respect to which a choice of law becomes necessary are of different quality. They may concern the nature and character of a right, for a right may be classified differently in different legal systems and the law governing the right itself might, in its turn, depend on the proper definition of the right.¹ Thus, in the English conflict of laws different principles apply to rights arising from contract and rights arising from tort. But before being able to apply either set of rules, we have to ascertain whether the right in dispute is of a contractual or a tortious character. This involves already a choice of law, namely the ascertainment of the legal system competent to define the right in dispute. The "preliminary question"² being settled, the right itself has to be connected with the law of a legal unit.³ This step involves again a choice of law. The test established by the conflict of laws for the ascertainment of the law applicable to the right in issue varies according to the character of that right. Thus, in English law rights in the nature of a personal status are generally governed by the domicile of the person in question, rights arising from contract are determined by the law which according to the intention of the parties shall prevail (shortly called the proper law of the contract), and rights of a proprietary character are often governed by the law of the place where the property in question is situate. Consequently, the process of selecting the law applicable may arise at several junctures during the examination of a legal problem, and it is, therefore, correct to state that the problem of the choice of law is of varying order and degree.

The statement that the principal task of the conflict of laws is to lay down rules for the choice of law, indicates, at the same time, the limitations inherent in our subject. Once that task has been discharged, the conflict of laws withdraws,⁴ and is no longer concerned with the issue. If it is found that the law applicable is the municipal law of the court where the suit has been brought, the suit will be argued and decided according to the ordinary rules of that law, as if there had never been a foreign element in it. If, on the other hand, according

¹ On the definition of the right, see p. 33, *post*.

² A. H. Robertson, "The 'preliminary question' in the Conflict of Laws," 55 *L.Q.R.* (1939), 565, and "Characterisation in the Conflict of Laws," *Harvard Studies in the Conflict of Laws*, Vol. IV, 1940, p. 135.

³ On the connection of the right, see p. 44, *post*.

⁴ Cheshire, 3rd ed., p. 10.

to the rules of the conflict of laws foreign law applies, the party who desires to rely on the foreign law has to produce evidence with respect to that law, and the case will be decided on the strength of that evidence. It does not, however, fall within the province of the conflict of laws to ascertain the contents of foreign law, and it would be erroneous to assume that the rules of foreign law, which may eventually be applied to the issue, pertain to our subject-matter. Herein lies the distinction between the conflict of laws and comparative law.¹ The latter branch of law is concerned with an examination of the contents of different legal systems in their application to an individual legal problem, and is, e.g., employed if a legal document relating to a foreign transaction is drafted and the question arises whether it should contain a clause providing for the application of the law of a particular country to the transaction.

Here the problem is to exclude or minimise the dangers resulting from a clash of territorial systems. In other words . . . applied comparative law is concerned with preventive jurisprudence whilst the conflict of laws deals with the clinical side.²

III. NATURE OF THE CONFLICT OF LAWS

In conclusion, an attempt will be made to ascertain the general principle underlying the application of foreign law in the municipal jurisdiction.

It may be asked: Why do the municipal courts pay regard to foreign law at all? Why is not the maxim "whoso goes to Rome must do as those at Rome do" extended to all suitors in the municipal courts, and municipal law applied to their disputes to the exclusion of all other laws? Is not the application of foreign law (which may sometimes be required by the rules of the municipal conflict of laws) out of harmony with the principle of territorial sovereignty?

These questions have been differently answered by international jurists.³ Those who, like the adherents of the international school,⁴ hold that the conflict of laws is, in fact, a kind of common usage of mankind, refer to the international character of the subject; others like John Voet,⁵ or Story⁶ justify the application of foreign law in the municipal sphere by considerations of the "comity of nations," i.e., by the "mutual interest" of the nations and a tacit expectation that the

¹ H. C. Gutteridge, *Comparative Law*, Cambridge, 1946, pp. 41 ss., and *Comparative Law and the Conflict of Laws*, (1944) 29 *Trans. Grotius Soc.*, 119.

² M. Schmitthoff, "The Science of Comparative Law," in 7 *Cambridge Law Journal*, 1939, p. 107.

³ D. J. Llewelyn Davies, *Règles Générales de Conflits de lois*, 21-66.

⁴ p. 25, *post*.

⁵ p. 18, *post*.

⁶ p. 24, *post*.

attitude of municipal law should be reciprocated by other laws. The modern school of English and American law, as represented in the teaching of Dicey and Professor Beale, does not accept these views but, following the teaching of Huber,¹ has evolved a third theory which is known as the doctrine of the duly acquired right, or briefly the doctrine of the vested right.

It is, in the view of modern English law, a requirement of justice—*ex debito justitiæ*²—that rights duly acquired under a foreign law should, in principle, be respected and protected in the municipal courts in the same manner as rights acquired under municipal law. This principle has been expressed by Turner, L.J.,³ in the following terms—

I apprehend that where rights are acquired under the laws of foreign states, the law of this country recognises and gives effect to those rights, unless it is contrary to the law and policy of this country to do so.

Dicey states as "General Principle No. 4"⁴ that—

any right which has been duly acquired under the law of any civilised country is recognised, and in general enforced by English law.

It follows from these statements that the English courts attribute recognition not to the foreign law as such, but to private rights created by the foreign law—a distinction drawn by Maugham, J., (as he then was) in *In re Askew*⁵—

For the English Court will enforce these rights, though, I repeat, it does not, properly speaking, enforce Utopian law.

This important distinction may be illustrated by the case of proceedings instituted in the English courts upon a foreign judgment. Such a judgment is in the nature of foreign law (though binding only on the parties to the suit) and differs from the general foreign law only in the extent of its application. The English courts refuse, in the absence of special enactments, to enforce the foreign judgment directly, but are prepared to recognise the rights and obligations created by it. Since a final judgment of a competent foreign court imposes on the parties a legal obligation to abide by the decision and to obey it, the English courts will, in general, enforce that obligation and do not admit a re-examination of the foreign judgment on the merits.⁶

¹ p. 19, *post*.

² Lord Brougham in *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 530.

³ In *Hooper v. Gumm* (1867), L.R. 2 Ch. 282, 289. See further Sir William Scott in *Dalrymple v. Dalrymple* (1811), 2 Hagg. Con. 54, 58-9.

⁴ 5th ed., p. 17. See further G. Kaeckenbeek, "The protection of vested rights in international law," in 17 *B.Y.B.I.L.*, 1936, 1, 5-7.

⁵ [1930] 2 Ch. 267.

⁶ See pp. 417, 430, *post*.

The distinction between foreign law, which is not entitled to enforcement in the English jurisdiction, and rights created by that law, which generally are protected by the English courts, disposes, further, of the objection that the principle of territorial sovereignty is infringed by the application of foreign law in appropriate cases. Since the foreign law is invoked in the municipal jurisdiction only for the determination of private rights alleged to be duly acquired under that law and not on the authority of the foreign sovereign who made it, such an infringement is entirely out of the question. The harmony between the doctrine of the vested right and the principle of territorial sovereignty has been explained by Turner, V.C.,¹ in lucid language—

I take the rule to be universal that foreigners are in all cases subject to the laws of the country in which they may happen to be; and if in any case, when they are out of their own country, their rights are regulated and governed by their own laws, I take it to be not by force of those laws themselves, but by the law of the country in which they may be adopting those laws as part of their own law for the purpose of determining such rights.

It should, however, be remembered that in practice general principles such as the doctrine of the vested right in the conflict of laws, or the maxims of equity in that branch of the law,² or in the law of contracts the "elementary principle . . . that people should keep their contracts and carry them out,"³ are rarely invoked in their abstract form but materialise in a variety of detailed rules of law applicable to practical problems submitted to judge or counsel. This experience should not, however, induce us to deny the existence of those general principles, as has been done with respect to the doctrine of the vested right by the French Professor P. Arminjon⁴ and, following him, by Professor Cheshire.⁵ First, general principles such as the doctrine of the vested right are invoked in fact, if not in terms, whenever the courts have to decide on novel issues, and are therefore of great value for the expansibility of judge-made law. Secondly, the fact that municipal courts take cognizance of foreign law at all, is a phenomenon of such striking character that it demands a rational juristic explanation which is in no way vitiated by the experience that in exceptional cases overriding domestic interests render inadmissible the enforcement of rights duly acquired abroad. Thirdly, it is believed that an intelligible and coherent system of the conflict of

¹ In *Caldwell v. Van Vissingen* (1851), 9 Hare 415, 425.

² Llewlyn Davies, *op. cit.*, 42.

³ du-Parcq, L.J., in *Kleinwort Sons & Co. v. Ungarische Baumwolle* (1939), 108 L.J. 861, 865.

⁴ *Recueil des cours*, 1933, II, 1-105.

⁵ 3rd ed., pp. 47-50.

laws can—and can only—be founded upon the doctrine of the vested right. If that doctrine had no other merits but to provide the structure for the scientific exposition of the conflict of laws, its existence would amply be justified. Apart therefrom, however, the doctrine undoubtedly has the express approval of the English courts¹ and, moreover, provides for the English and American lawyer a common method of approach to problems pertaining to the conflict of laws. These considerations strongly militate against a hasty abandonment of the doctrine of the vested right by the English jurist, but at the same time make it incumbent on us to analyse carefully the characteristics of a duly acquired right and the exceptions admitted to the general principle.²

¹ See p. 9, *ante*.

² See Chapter III, p. 31, *post*.

CHAPTER II

HISTORY AND MODERN DOCTRINES OF THE CONFLICT OF LAWS

The rules of the conflict of laws have not been developed in the same manner in all countries. Some countries have evolved them at a comparatively early stage in their legal history. In other countries the rules on this subject have been tardily elaborated. The reason for the difference is that this branch of law comes into existence only if close contact is established between separate legal units. Thus, in the city states of medieval Italy, the provinces of Holland or pre-Napoleonic France, and in the United States of America the rules governing the conflict of laws were established at an early stage in the history of the various legal units concerned. A federal constitution, such as that of the United States of America, usually provides a fertile ground for the growth of rules regulating the conflict of laws since the federal constituents, though combined by political ties in respect of certain matters, are often jealous of their independent status in regard to other matters. On the other hand, in an insular country like England, rules relating to the conflict of laws made a comparatively belated appearance mainly owing to the fact that the country was under the centralising influence of the Common Law and had few close contacts with other legal units; the main reasons for the development of such rules, when they did make their appearance, were the union with Scotland which involved close contact with a contiguous legal unit and, later on, the expansion of international trade which called for the recognition in English courts of rights acquired under foreign legal systems.

I. FROM ANCIENT ROME TO THE DUTCH SCHOOL*

1. ANCIENT ROME.

In Roman law, the sacred *jus civile* was reserved for Roman citizens. Issues between a Roman citizen and a non-citizen or between non-citizens were decided on the basis of another legal system, the *jus gentium*,¹ which was an aggregate of legal prescripts supposed to be

* For further reading: 3 Beale, 1881; F. Meili, *International Civil and Commercial Law* (transl. Arthur K. Kuhn), 50. E.-M. Meijers, "L'histoire des principes fondamentaux du droit international privé à partir du Moyen Age," in *Recueil des cours de l'Académie de Droit International*, 1934, Vol. 49, p. 547.

¹ "The jurisdiction of the Roman Courts was regulated in the year 512 A.U.C. (242 B.C.). The law was determined by the *praetor urbanus* between Roman

the common inheritance of all nations, a sum of equitable rules applying to all foreign nations without differentiation. In the modern systems of conflict of laws the aim is to discover the law most appropriate to the transaction in question. The Roman lawyer "never dreamed of learning the law of the non-Roman."¹ "Instead of choosing the national law of either of the parties, the Romans applied a third law, the *jus gentium*."² The attitude of the Romans appears primitive to the modern mind. It indicates, however, that the sovereign is entirely at liberty to provide the law that is to be applied in his courts to conflictual cases.

The distinction between the *jus civile* and the *jus gentium* was obliterated by Caracalla's edict (A.D. 212). Thereby all inhabitants of the Roman Empire were granted the status of Roman citizens and, in consequence, came under the aegis of the *jus civile*. The latter then became "the territorial law of the Roman Empire."³ With the progressive disintegration of the vast Empire, local customs developed in the different provinces. These customs occasionally conflicted or were at variance with the imperial law. Justinian's Code (A.D. 529) contains references to these problems which have some resemblance to questions of the conflict of laws. For example, the *Corpus Juris* provides for the jurisdiction of the president of the province in foreign suits⁴ or for the application of the *lex situs* to immovables.⁵ These provisions, however, by no means exhibit a coherent theory on the subject of the conflict of laws.

2. THE PERSONAL LAW OF THE GERMAN TRIBES.

In the fifth century, the invasions of the German tribes led to new problems. After the settlement of some of these tribes in the territory of the Roman Empire, conquerors and conquered had to live on the same soil, and yet they were separated by culture, tradition and race. In this state of affairs the rule arose that every man carried with him the personal law under which he was born. Wherever he went, the Frank lived under Frankish law, the Visigoth under Visigothic law, the Roman under Roman law. "It often occurs that five men

citizens (*praetor qui inter cives jus dicit*), and by the *praetor peregrinus* in cases between non-citizens *inter se* and between citizens and non-citizens; he was the *praetor qui inter peregrinos jus dicit* or *praetor qui inter cives et peregrinos jus dicit*" (Meili (transl. Kuhn), 56).

¹ 3 Beale, 1881.

² Th. Kipp, *Quellenkunde des Römischen Rechts* (1896), 127 (quot. Meili (transl. Kuhn), 55).

³ Professor Ehrlich (quot. 3 Beale, 1881).

⁴ *Dig. I, 18, 3.*

⁵ *Dig. I, 15, 4, para. 2.*

walking or sitting together are each of them living under a different law." ¹ It was, therefore, customary for the parties to a deed or to an action to make an express declaration of law, e.g.—

ego ex gente Romanorum (Langobardorum, Goticorum, etc.) professus sum, ex jure Romano (Langobardico, Gothico, etc.) vivere.²

The conflict of laws in the modern sense is caused by the discord of two or more territorial laws. The clash of personal laws in the early Middle Ages was, in the words of Professor Beale, "a conflict of systems rather than of particular laws. In every thing except the actual holding of land . . . there was no real conflict of laws; all law was personal in its application, and each man was obliged only according to his own law."³ In short, law was too personal to admit of a conflict.

3. THE TERRITORIAL LAW OF FEUDALISM.

From the tenth century onwards, another state of affairs arose which has been rightly described as "the direct antithesis" ⁴ of the previous period. In England, France and Germany, the desire for peace within and without had evolved a new economy: Feudalism. The political, legal and military status of a person depended on his position in the feudal hierarchy. The feudal system was rigidly based on the holding of land. "Out of this psychological conception gradually arose the so-called principle of territoriality."⁵ The principle that a man carried his personal law with him wherever he went was abandoned and the doctrine prevailed that the law applicable to a man depended upon the land which he held and not upon his personal origin. So uncompromising was the territorial conception that there was no room for a branch of the legal system primarily devoted to the choice of law.⁶

4. THE ITALIAN STATUTISTS: BARTOLUS.

In those parts of Europe which had not accepted the feudal system, the position was different. By the twelfth century, there had emerged in Italy a number of city states which were almost autonomous and yet essentially cognate. But from the political jealousies which

¹ Bishop Agobard of Lyons in a letter to Ludwig the Pious (Meili (transl. Kuhn), 58).

² Meili (transl. Kuhn), 59.

⁴ Cheshire, 3rd ed., 26.

³ 3 Beale, 1886.

⁵ Meili (transl. Kuhn), 61.

⁶ 3 Beale, 1892-3, does not attach this effect to feudalism, he considers this conclusion as a "favoured trick of European modernists" and thinks that the rise of territorial law is due to the settling down of the tribes.

developed between these municipalities and the commercial intercourse which resulted from their geographical and cultural connection, there arose a legal system which attempted to allocate to each territorial law its proper space. In the Italian city states the civil law as expressed in Justinian's Code was considered to be the common basis of the law. The municipalities had, however, issued local ordinances, so-called "*statuta*." These local ordinances conflicted sometimes with Justinian's Code, sometimes with the ordinances of other municipalities. In consequence, an attempt had to be made to avoid such discrepancy. This attempt was made in the spirit which dominated the medieval law schools in Bologna and other places in Upper Italy and which has been described by Professor Plucknett¹ as follows.—

Reverence for authority made it necessary to preserve ancient texts, such as the *Corpus Juris*, but the practical demands of daily life made it equally necessary to have the gloss which alone made the system workable.

The mentality of the Glossators and Postglossators explains why the connection between the venerable text and the modern commentary is sometimes not quite obvious.² By this process, Justinian's Code came to be the domicile of choice though not the domicile of origin of the conflict of laws. The doctrine of the Italian School was expounded in a gloss to the passage *cunctos populos quos* which occurs in the chapter *De summa trinitate* of the *Corpus Juris*, enjoining all citizens of the Roman Empire to confess the Christian faith. The first person to write such a gloss was apparently Karolus de Tocco (who died 1200); his method was followed, with some variations, by Accursius (1182–1260).³ The most eminent representatives of the Italian school are Bartolus (1314–57) and his successor Baldus (1372–1400). Bartolus was a professor of law at Pisa and Perugia. He noticed for the first time the problems of the conflict of laws and treated them systematically. "His method was to disentangle the different legal questions, to examine separately all legal relations, which may result in a conflict of laws, and to indicate the 'statute' that according to reason and equity is most convenient to every one of them."⁴ Bartolus developed what was later called the theory of statutes which

¹ Plucknett, *Concise Legal History*, 3rd ed., p. 603.

² Phillimore, *Commentaries upon International Law*, Vol. IV, p. 19: "Who would have expected such a treatise in a gloss on the words *cunctos populos* in a chapter *De summa trinitate*."

³ E.-M. Meijers, *loc. cit.*, p. 594.

⁴ A. Weiss, *Manuel de droit international privé*, 8th ed. (1920), pp. 344–5.
E—(L.67)

derived its name from the municipal ordinances, the *statuta*. Bartolus declined to recognise the existence of a universal principle underlying the whole system of the conflict of laws. In his view, every problem was subject to its own considerations. Thus, contracts were governed by the *lex loci contractus*, torts by the *lex loci delicti*, property by the *lex situs*. Bartolus dealt further with the conflicting jurisdiction of the *statuta* of the city states. He drew a distinction between real and personal statutes. The former were those concerned with property. They affected only property within the jurisdiction, no matter whether the transaction affecting such property was concluded within or without the jurisdiction. Personal statutes were those dealing with the person, e.g. those determining the capacity of a person to do or not to do a legal act. They followed the person and could be pleaded outside the jurisdiction in his favour. Bartolus considered that the assessment of the character of the statute was a question of interpretation and laid down certain rules of construction. Unfortunately, this technical aid was taken as a canon of substantive law by some of his followers who thus obscured the rational and simple division of real and personal statutes, a division which, in the words of Professor Beale¹—

was one of the most original and ingenious discoveries of the great master, a discovery which his contemporaries could not make, and his successors for five hundred years failed to understand.

The Italian Statutists had for the first time in legal history recognised the problems arising from conflicting territorial jurisdiction and had attempted to solve those problems on the basis of reason and equity.

5. THE FRENCH SCHOOL : Dumoulin and D'Argentré.

From Italy, the science of the conflict of laws spread to France. There the feudal kingdom of the Carlovingians had failed to resist the disintegrating influence of the great vassals. By the end of the fourteenth century the provinces of France had acquired a considerable degree of autonomy, though the Capets successfully strove to strengthen the central government. The feudal mentality had subsided and the time had become ripe for a mitigation of the old rule that "*toutes coutumes² sont réelles*." The French lawyer of the fifteenth century though accepting, in principle, the doctrine of the Italian Statutists was confronted with a problem arising against a different background. In Italy, Justinian's Code was still regarded as the common law, and

¹ 3 Beale, 1891.

² I.e., the provincial customs.

the *statuta* of the cities had no higher status than local law. In France, no system of common law was in existence and the *coutumes* of the provinces were the sole source of the law. In consequence, whilst, in Italy, rules governing the conflict of laws appeared as an interpretation of the local statute law, the French school took a more liberal view and considered as part of the substantive law the rules which they formulated. "*Statuta*" ceased to mean "statutes" and came to mean "law." The most eminent among the French lawyers of this period were Bertrand d'Argentré (1519-90), a Breton lawyer, and Charles Dumoulin (1500-66). The representatives of the French school agreed in emphasising the territorial side of the Statutist doctrine, but differed on the cardinal point as to which statutes were to be classified as real and which as personal. These differences are illustrated by the theories of d'Argentré and Dumoulin. Dumoulin's writings show that he was in favour of the uniformity of the law of France, and reflects the centralising efforts of the French monarchy; he attached particular weight to the personal statute. D'Argentré, on the other hand, was the stubborn protagonist of the autonomy of the provinces, particularly of Brittany,¹ and he added to the Italian division of statutes into real and personal a third category, namely, statutes mixed, and also subjected this extensive group to the territorial principle.

Among the later French writers, Froland (who died 1746), L. Boullenois (1680-1762), and Bouhier (1673-1746) are worthy of mention. They too paid lip service to the Statutist doctrine, but they attributed more importance to the personal statute.² These writers represent the connecting link with the modern French school of Neo-Statutists who are the advocates of the personal principle to-day.³

On the whole, the teaching of the French School of the sixteenth century was still under the spell of the Statutist dogma and indulged in discussions of scholastic problems such as the true distinction between the personal and real statute, a problem which to-day has rightly been described as insoluble.⁴

6. THE DUTCH SCHOOL : Voet and Huber.

In Holland the war of independence which the Dutch people had waged against the Spain of Philip II and Philip III had resulted in

¹ Meili, *op. cit.*, 90.

² Froland: "La personne est la plus noble et doit l'emporter sur les biens, qui ne sont faits que pour elle."

³ See p. 26 *post*.

⁴ Cheshire, 3rd ed., 31.

the creation of a new commonwealth, the United Provinces. The new political unit consisted of a number of independent confederates jealous of one another but welded together for the defence of liberty and religion against the common enemy. As in France in the time of Dumoulin and d'Argentré, these conditions were favourable for the establishment of a system of rules governing the conflict of laws.

The older school of Dutch jurists such as Burgundus (1586-1649), Rodenburg (1618-68) and Paul Voet (1619-77) adopted d'Argentré's classification of statutes into real, personal and mixed and were inclined to extol the territorial rule even more than the Breton autonomist. Rodenburg and Paul Voet, however, began to express a doubt whether the unlimited power of the sovereign—territorial sovereignty was for the jurists of the young nation an article of political faith—to legislate for all persons and things within the bounds of his territory was compatible with the personal principle according to which the foreigner carried his law into the sovereign's territory and the sovereign was bound to respect the prescripts of another sovereign with respect to the latter's subjects and their movables situate in the first sovereign's territory.

Later Dutch writers like John Voet (1647-1717), the son of Paul Voet, and Ulric Huber (1647-1717) developed these ideas still further. As a result they departed completely from the traditional reasoning of the Statutists and put the conflict of laws on the modern basis of territorial sovereignty, a doctrine which had decisive influence on the subsequent development of this branch of the law in England and the United States. John Voet rejected the Statutist approach to the conflict as such ¹—

I think that in the case of all statutes, whether real, personal or mixed, or however otherwise called or classified, this is the correct rule: that statutes lose absolutely all their power outside the territory of the legislative, nor is the judge of another place obliged as to things situated in his own country, by any necessity of law whatever, to follow or approve laws not his own.

Voet thought that a sovereign would, in appropriate cases, admit the application of foreign law in his courts in order to comply with the "comity of nations," and in expectation that the foreign sovereign concerned would reciprocate in similar circumstances. The departure from the Statutist mentality was even more evident in the teaching

¹ John Voet, *Commentariorum ad Pandectas*, Lib. I, Tit. IV, Pars. II, De Statutis, para. 11 (trans. 3 Beale, 1902).

of Huber.¹ In his chapter *De conflictu legum diversarum in diversis imperiis*, Huber laid down three axioms²—

- (1) The laws of any sovereignty have force within the territory of that country and bind all subjected to it, but not beyond.
- (2) All are considered as subjects of a sovereign who are found within his territory, whether permanently or temporarily there.
- (3) Sovereigns out of comity act so that the laws of each nation brought into existence within the territory may hold their force everywhere so far as they do not prejudice the power of the law of another sovereign and his subjects.

Though both Voet and Huber recognise the territorial sovereignty and the "comity of nations" as the basis of their doctrine of the admission of foreign law in municipal Courts, they differ essentially in their conception of the comity. For Voet, the comity of nations is equivalent to political expediency. Huber, on the other hand, means thereby a canon of legal prescripts similar in quality to the Law of Nations envisaged by Hugo Grotius. For Voet the application of foreign law in municipal courts is a matter of enlightened self-interest; for Huber it is a legal obligation pertaining to Public International Law. In consequence, Huber was compelled to go further in order to find an explanation why the application of foreign law formed part of the Law of Nations. His answer was: because private rights vested under the law prevailing at the place of their origin must be respected in all other jurisdictions. This view had particular influence on the Anglo-American doctrine and was the origin of the theory of vested rights which to-day forms the juristic basis of the Anglo-American rules relating to the conflict of laws.

The teaching of Huber and the other representatives of the Dutch school removed the conflict of laws from the *cul-de-sac* into which the Statutists had manœuvred it. By abandoning the Statutist mentality, they put the system on a new and modern basis. Their doctrine has been denounced by the Neo-Statutists as reactionary and heretic; it has been accepted by the Common Law jurists as a simple and plausible key for the solution of a number of complicated legal questions. It would be vain to attempt a justification of one or the other of these respective views, which are founded on deep rooted differences

¹ Huber was a professor of the Dutch University in Franeker and at some time a Judge of the Supreme Court of Friesland. He came from a Swiss family. His grandfather had fought for the Dutch in the War of Independence and had remained in Holland. As to Huber's influence on English law see Llewelyn Davies, *B.Y.B.I.L.*, 1937, 49.

² *Praelectiones juris Romani et hodierni*, ed. Macerata II, 55, ed. Menck (1707), II, 23. (Translation in 3 Dallas' Reports, p. 370 n.) (3 Beale, 1903.)

in juristic thought and depend for their explanation on sociological rather than legal considerations.

II. HISTORY OF THE CONFLICT OF LAWS IN ANGLO-AMERICAN LAW*

1. BEFORE THE UNION WITH SCOTLAND.

In England, the unifying influence of the central courts resulted in the growth of a common law for the whole realm and in a decline of the local jurisdictions. This situation did not call for the formulation of rules governing the conflict of territorial jurisdictions.

A. English and Norman Law. However, this historical review would not be complete without reference to the conflict of personal laws as existing in medieval England: and from that broader point of view it may well be asked why, after the Norman Conquest, the personal laws of the Norman conquerors did not clash with those of the conquered English. It is true that there were two rules which drew a marked distinction between Normans and English.¹ First, if a person was found dead, and it could not be proved that he was English, he was presumed to be Norman and the hundred where the body was found had to pay the fine which followed the slaying of a Norman.² Secondly, the procedure in criminal cases was different. If an Englishman was accused, he could choose between battle and ordeal. The Norman, if indicted, was allowed, in certain circumstances, "to swear away the charge with oath helpers 'according to Norman law'."³ The reason why the conflict between the personal laws of the Normans and those of the English was confined to relatively small matters has been described by Pollock and Maitland—

But it was too late for a system of "personal," that is, of racial laws. Even in France law was becoming territorial, and a king of the English who was but Duke of the Normans was interested in obliterating a distinction which stood in his way if he was to be king of England.⁴

B. Canon and Common Law. From the broader view of a conflict between personal laws, the relationship between the Canon

* **For further reading:** Alexander N. Sack, "Conflicts of Laws in the History of the English Law," in *Law, A Century of Progress, 1835-1935*, New York, 1937, Vol. 3, p. 342.

¹ See Pollock and Maitland, *History of English Law*, 2nd ed., Vol. I, p. 89.

² *Leges Henrici Primi* (about 1118), XCII, 1, 8, 9. Holdsworth, *History of English Law*, Vol. I, 3rd ed., p. 11, fn. 11.

³ Pollock and Maitland, *op. cit.*, p. 90.

⁴ *Ibid.*, Vol. I, p. 91.

Law as administered by the ecclesiastical courts and the Common Law as applied in the King's courts has to be examined. Though there had already been frictions in earlier times the tension became more acute in the reign of Edward I when the Common Law judges ceased to be ecclesiastics and "became laymen learned only or chiefly in the Common Law."¹ The conflict between the law of the Church and the law of the King was by no means confined to purely spiritual questions. In the sphere of criminal law, the benefit of clergy was originally a defence of immunity pleaded by the indicted clerk in the temporal courts and comparable to the modern plea of extritoriality of a foreign diplomat. Further, the ecclesiastical courts claimed a share in matters of contract and met here with the resistance of the Common Law judges. In 1303, Chief Justice Beresford exclaimed—

Within these twenty years people have been accustomed to take bonds binding debtors to submit to the decision of Holy Church in mercantile matters, and by these obligations they used to draw to the church pleas of debt, to be pleaded before them; and it was seen that that was against law, and it was ordained that they should no longer intermeddle with those kinds of pleas.²

In particular, the notion of *laesio fidei* was employed by the ecclesiastical courts for the purpose of encroaching upon the temporal jurisdiction. "As late as 1460 all the Judges in the Exchequer Chamber found it necessary to restate formally the rule that *laesio fidei* could not be made the means to give these courts a general jurisdiction over contracts."³

The conflict of Canon Law and of Common Law ended with the complete victory of the latter and did not leave a permanent mark on the theory of the English conflict of laws.

C. Early mercantile law. The considerable amount of foreign trade which England transacted in early times did not result in a body of conflictual rules, though to-day international trade is one of the main causes of the existence of such a body of rules. The reason why no conflict of mercantile laws arose in early days is that no distinct national bodies of mercantile law existed in those days. In the fifteenth and sixteenth centuries the mercantile law of all nations was still in the making. An attempt to exercise a "choice of law" would have been in vain because the same cosmopolitan mercantile law was applied in the different commercial centres of Europe. The

¹ 2 Holdsworth, *op. cit.*, 4th ed., p. 304.

² Y.B., 30-1 Edw. I (R.S.) 492.

³ 2 Holdsworth, *op. cit.*, p. 305.

mercantile courts which pronounced it were often composed of indigenous and foreign merchants alike. In those days mercantile law partook more of applied comparative law ¹ than of the conflict of laws. There were, however, frequent conflicts of jurisdiction between the Common Law Courts and Admiralty, particularly when, in the second half of the sixteenth century, the former began to assume jurisdiction over acts transacted outside the Kingdom, by allowing the plaintiff to allege a fictitious venue, e.g. that the act was committed in "Bourdeaux, to wit in the parish of St. Mary le Bow in the Ward of Cheap."²

2. SINCE THE UNION WITH SCOTLAND.

A. Calvin's case. In 1603, James VI of Scotland became James I of England. The two legal units of England and Scotland came under the rule of the same monarch.³ Almost immediately a conflict of territorial laws ensued. According to the law of England, as it then was,⁴ an alien could not own or inherit English freeholds. The question was whether the Scottish subjects of the King were to be considered as aliens in England and therefore disabled from holding English land or whether they were in the same position as the King's English subjects. The issue was decided in *Calvin's Case* ⁵ which is not only a landmark in constitutional law but also the first great case on the English conflict of laws.

Robert Calvin was a so-called *postnatus*; i.e. he was born in Scotland after the accession of King James to the English throne. He claimed certain freehold estates situate in the city of London. The defence was that he being an alien in England was incapable of holding land in this country. Judgment was given in Calvin's favour.

The Court held that Robert Calvin was a natural born subject of the King of England; that he owed the King allegiance; and that, in consequence, he could hold freeholds in England. The status of a subject was based on the personal bond of allegiance between the King and his subject. "Ligeance is the mutual bond and obligation between the King and his subjects whereby his subjects are called his liege subjects because they are bound to obey and serve him."

¹ Thus in maritime law the customs embodied in the *Judgments of Oléron* (an island off the west coast of France) were adopted by the seaport towns of Brittany and Normandy and were finally transplanted to England. Most Mediterranean countries modelled their maritime law on the *Consolato del Mare* which originated in Barcelona.

² This is a ward in the City of London; see Sack, *op. cit.*, pp. 357 ss., 5 Holds-worth, *op. cit.*, 140.

³ England and Scotland remained separate political units but formed a "Personal Union"; in 1707 (by 6 Anne c. 2) the two distinct kingdoms were united as the Kingdom of Great Britain.

⁴ For the present position of the law, see British Nationality and Status of Aliens Act, 1914, s. 17.

⁵ (1608) 7 Rep. 2a; for a detailed account of the case see J. Mervyn Jones, *British Nationality*, 1947, 30.

The observation of Coke that *Calvin's Case* was "the weightiest for the consequent, both for the present, and for all posterity" ¹ became true to an extent which the Lord Chief Justice could never have foreseen. When in the seventeenth and the subsequent centuries the dominion of the King extended beyond the seas, every person born in the vast empire became a British subject as a matter of course because he was born in the King's allegiance. The equal political status of all natural born subjects of the British Commonwealth and Empire ² is a direct consequence of the decision in *Calvin's case*. The rule in *Calvin's case* "made the uniform status depend on the personal tie of allegiance to the crown; and it thus played no small part in consolidating the position of the King as head and main bond of union between the confederation of independent communities, which now constitute the British Empire." ³ Thereby, the feudal mysticism of allegiance ⁴ acquired a modern meaning which is essentially different from the continental conception of nationality. The Common Law doctrine of allegiance furnishes, further, the ultimate explanation why the English and American legal systems adhere to the principle of domicile in preference to that of nationality. ⁵

B. English case law of the eighteenth century. The eighteenth century was, as regards the development of the English system of conflict of laws, much more important than is generally assumed. The union with Scotland finally achieved in 1707 was not merely a union of crowns but a political union of the countries and resulted in an increase in the personal and commercial relations of the peoples of the two countries. In the course of the seventeenth and eighteenth centuries the trade of the mother country with the colonies and foreign countries expanded rapidly, and mercantile law acquired a distinctly national character. These conditions rendered it necessary for the English courts to evolve rules dealing with a conflict of territorial laws.

Among the Judges who developed these rules were Lord Nottingham, ⁶ Lord Hardwicke, ⁷ Lord Mansfield, ⁸ Lord Kenyon, ⁹ and Lord Stowell. ¹⁰ Important principles of the conflict of laws were laid down

¹ 7 Rep. 3b.

² Which is preserved in Part I of the British Nationality Bill, 1948.

³ 9 Holdsworth, *op. cit.*, 83; see Farwell, J., in *Re Johnson*, [1903] 1 Ch. 821, 833.

⁴ See Dicey, 5th ed., note 7: "Common Law view on English nationality," at p. 896.

⁵ See pp. 29, 65, *post*.

⁶ *Arglasse v. Muschamp* (1682), 1 Vern 76.

⁷ *Penn v. Baltimore* (1750), 1 Ves. 444.

⁸ *Sommersett's Case* (1772), 20 St. Tr. 1.

⁹ *Hunter v. Potts* (1791), 4 T.R. 182.

¹⁰ *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395.

in this period. In respect of real property, the distinction was drawn between claims affecting title¹ and those relating to equitable interests, and it was held that the former were exclusively governed by the *lex situs*,² whilst the latter were subject to the jurisdiction of the English Courts though the land was situate abroad.³ The rule "*mobilia sequuntur personam*" was applied to cases of bankruptcy⁴ and intestacy.⁵ In matrimonial law, the principle that a marriage is valid if concluded according to the form of the *lex celebrationis*,⁶ was accepted even if the parties had gone to a place other than their usual domicile with a view to evading the form of marriage prescribed by the law of their domicile.⁷ Among the leading cases of this period were decisions relating to the recognition of foreign judgments,⁸ to the non-admissibility of foreign penal and confiscatory laws,⁹ and to the extritoriality of foreign diplomatic agents.¹⁰

The foundations of the English conflict of laws were thus laid by the great judges who incorporated mercantile law into English Common Law, and by their contemporaries.¹¹ A considerable body of case law was built up during this period which well merits the description of "the formative period" of the English conflict of laws. That law, however, was still an incoherent mass, waiting for the hand of the master who would co-ordinate it into an intelligible system.

C. Joseph Story. The master was to appear in the United States of America in the person of Joseph Story. In that country, "a recently formed confederation of states, each of which was legally independent, turned the attention of lawyers to the practical solution of the necessary resulting conflicts."¹² The work of Joseph Story, professor at Harvard University and a Judge of the Supreme Court, has been described by Professor Beale as the "focal point in the history of the conflict"; in his *Commentaries on the Conflict of Laws* (1834), Story developed the modern principle of territoriality which forms the basis of the present Anglo-American doctrine of the conflict of laws. Story has expressed this principle in the following classical terms¹³—

¹ *Coppin v. Coppin* (1725), 2 P. Wms. 291

² *Ibid.*

³ *Penn v. Baltimore* (1750), 1 Ves. 444.

⁴ *Sill v. Worswick* (1791), Bl. H. 665.

⁵ *Pipon v. Pipon* (1744), Amb. 27.

⁶ *Compton v. Bearcroft* (1769), 2 Hag. Con. 444 n.; *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395.

⁷ *Compton v. Bearcroft*, p. 307, *post*.

⁸ *Geyer v. Aguilar* (1798), 7 T.R. 681.

⁹ *Folliott v. Ogden* (1790), 1 H.Bl. 123; *Somerset's Case* (1771), 20 St.T. 1.

¹⁰ *Barbui's Case* (1737), Cas. temp. Talb. 280; *Heathfield v. Chilton* (1767),

4 Burr. 2016.

¹¹ Sack, *op. cit.*, p. 377.

¹² 3 Beale 1911.

¹³ Story 7th ed., Boston 1872, No. 18, at p. 19.

. . . every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect and bind directly all property whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done.

Story so far is influenced by the teaching of Huber. He acknowledges without reservation the "undisputed preference over other continental jurists" which the English and American lawyers attribute to Huber. However, the second feature of Huber's doctrine, the doctrine of the vested right, is not accepted by Story. He sees the reason for the application of foreign law in the municipal Courts "in mutual interest and utility, in a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return." ¹ In this respect, Story's theory is nearer to John Voet's interpretation of *comitas* as a form of enlightened self-interest than to Huber's view of the comity of nations as an obligation of public international law.²

III. MODERN DOCTRINES OF THE CONFLICT OF LAWS

1. THE DIFFERENT DOCTRINES.

The modern schools which attempt to explain the juristic basis of the conflict of laws can be classified under three heads: the Internationalists, the Neo-statutists, and the Territorialists.³

A. The Internationalists. The Internationalists maintain that the reason for the application of foreign law in the municipal courts is to be sought in the prescripts of a truly international law that forms part of the law of nations. According to this school of thought "private international law"—and in the teaching of this school this expression has colour and significance—is applied by all municipal courts on the strength of this higher authority. According to the Internationalists, "private international law" is accepted by all civilised nations as a kind of common custom. "This has been rightly called a new *jus gentium*, but it is a *jus gentium* properly so called, a law of all people, not a law fixed by a single dominant state and called by a seductive name."⁴ The doctrine of the Internationalists was

¹ *Ibid.*, No. 31, p. 29.

² 3 Beale, 1958.

³ Horst Mueller, p. 160.

⁴ 3 Beale, 1925.

developed on the Continent. There the idea of a universal law based on Justinian's Code still lingered in the minds of many lawyers and rational notions such as those underlying the doctrine of the "natural law" favoured the attribution of certain obligations as dependent upon a source superior to the command of the national lawgiver. The outstanding representative of the Internationalist school is the German jurist Friedrich Karl von Savigny (1779-1861). He maintains that there exists "a community of law among independent states, from which has arisen an approximate uniformity in the treatment of conflicts among different positive laws."¹ According to Savigny the object of the rules governing the conflict of laws consists in determining for each legal relation the law to which, in its proper nature, it belongs or is subject.² Whether the legal relation in question (*das Rechtsverhältnis*) has its "seat" in the municipal or foreign law, does not affect the binding quality of the prescript and is, therefore, of no concern to the courts. Savigny considers the "seat" of the *Rechtsverhältnis* to be the *lex domicilii* in cases concerning personal status: the *lex situs* in the case of land and movables; and the *lex solutionis* in the case of contracts. The doctrine of Savigny was elaborated by the Germans von Bar and Zitelmann and the Dutch Professor Jitta. Jitta's view is of particular interest. He develops the doctrine of the Internationalists to its logical conclusion by reducing the authority of private international law to a "world law," a common law of the human race. Jitta's "world law" is essentially the same as del Vecchio's "universal law";³ both represent the succession to the school of the "natural law," the followers of which in this country were Locke and Bentham. The teaching of the Internationalists was accepted in England by Phillimore and Westlake, and in America by Wharton and Minor.

B. The Neo-statutists. The Neo-statutists⁴ do not attribute to the conflict of laws the character of a system of legal obligations derived from a super-national source. So far, they are in agreement with the Territorialists who emphasise the national character of the rules governing the conflict of laws. The Neo-statutists attempt—again like the Territorialists—to discover the general principle underlying all conflictual rules. To them, this general principle is the personal statute. The astounding revival of a doctrine which had

¹ Savigny (*System*), translated by W. Guthrie, 1869, p. 29.

² Savigny, *ibid.*, p. 27.

³ See e.g. Del Vecchio, "On the Statuality of Law" in 19 *Journal of Comparative Legislation* (1937), pp. 1, 19.

⁴ With the exception of Professor Pillet.

flourished in the days of the Barbarian invasions ¹ is hardly comprehensible without taking into account the change which the personal statute underwent in the nineteenth century. Prior to that century, the law of the domicile of a person was generally considered as governing his personal statute. After the publication of the Code Napoléon legal thought on the Continent came increasingly under the influence of the nationalist idea which in the sphere of politics had changed Europe into a camp of rival national states. In 1851, the Italian Mancini, in a famous lecture, ² "expressed to the full the feeling of nationality which gave rise to the French Codes, half a century earlier, and which finally culminated in the formation of the Italian Kingdom." ³ After the teaching of this representative of the *Risorgimento*, the personal statute became identified with the principle of nationality.

The Neo-statutist doctrine is widely accepted in France, Italy and Germany. Its outstanding representatives are the French Professors Weiss and Pillet. Professor Weiss bases his teaching on the remarkable statement that the abstract conception of the sovereignty of the state denotes really an aggregate of persons united under the same government by a contractual bond and that the territorial dominion of the sovereign is merely of incidental character. He maintains, supported by a statement of Montesquieu, that the "loi de la patrie" is intended to follow and actually does follow the subject wherever he goes. ⁴

C. The Territorialists. The Territorialists rely upon the rule that the state has sovereign power to make and enforce laws respecting all persons and property within its territory. They consider it the corollary to this rule that the state has no such power outside its territory. We have seen that John Voet and Huber pronounced this view for the first time distinctly; that in the eighteenth century the English Courts accepted this view; and that Story adopted it as the juridical basis of his system. Since then, it has been developed by many judicial and other authorities in this country and in the United States of America. Dicey and Professor Beale ⁵ support it, and it has

¹ See Sir Gorell Barnes, P., in *Chetti v. Chetti*, [1909] P. 67, 69: "The argument appears to me to be a medieval one. This country, differing in that respect from other countries, has repudiated the doctrine you are contending for, that a man carries about him his personal law."

² *Della nazionalità come fondamento del diritto delle genti*.

³ 3 Beale, 1931.

⁴ André Weiss, *Traité théorique et pratique de droit international privé*, Vol. 3, pp. 63-4.

⁵ Professor Beale died in 1943; see the obituary notes in 56 *Harv. L. Rev.* (1943), pp. 685-701.

been adopted by the *American Restatement*.¹ The latter lays down in Paragraph 1—

(1) No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law, but by the law of each, rights or other interests in that state may, in certain cases, depend upon the law in force in some other state or states.

(2) That part of the law of each state which determines whether in dealing with a legal situation the law of some other state will be recognised, be given effect or be applied is called the Conflict of Laws.

2. CRITICISM.

In conclusion, it is proposed to submit some critical observations on the three modern doctrines.

A. The Internationalists. The main objection to the Internationalist school is that their thesis is unreal, a dream rather than a fact. The diversity of the national systems regulating the conflict of laws is indisputable evidence against the existence of a universal custom from which private international law is alleged to derive its authority. Thus Maugham, J., observed in *In re Askew* ²—

It would seem that rules of private international law, not being founded on considerations of justice or statute, but being based upon considerations of justice and what is called "comity" ought to be the same in all countries though it is well known (contrary to the belief entertained by Lord Westbury: see *Udny v. Udny* [L.R.I.H.L. Sc. 441]) that they are not.

And Lindley, L. J., said in *Re Queensland Mercantile and Agency Co.*,³

The fact is, of course, notorious to us all, that if anybody studies private international law out of a French law book, he takes one view of it; if he takes an American book, he takes another view, they do not all take the same view.

This diversity exists not only in such signal matters as the antagonism between the principles of domicile and nationality, but also in various matters of detail. The unreal nature of the argument of the Internationalists is further revealed by the fact that international conventions have been necessary to regulate such questions as the

¹ American Law Institute, *Restatement of the Law of Conflict of Laws*, 1934, Para. 1, pp. 1-3. The *American Restatement* represents an attempt undertaken by the legal profession in the United States to state clearly the general common law of the United States. Though not possessing the binding force of judicial authority or of a statutory enactment, the *Restatement* is regarded by American jurists as of persuasive authority and is entitled, in England, to respectful consideration.

² [1930] 2 Ch. 264-5.

³ [1892] 1 Ch. 219, 226; see further Lord Selborne in *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 513.

validity of marriage, the effect of the dissolution of marriage, the validity of guardianship and the application of civil procedure.¹

B. The Neo-Statutists. The argument of the Neo-statutists that the incident of nationality is the ultimate solution for most conflictual questions is not convincing. First of all, this doctrine is not acceptable to political units that combine different legal units within their bounds. This objection has been thus expressed by Sir Frederick Pollock—

Nationality would be very well if each international unit had one, and only one system of law within its allegiance; and so it seems the natural and sufficient criterion to a French or Italian lawyer (subject to some little difficulties with African and Indo-Chinese customs). But it is quite unmanageable for a national sovereignty including many laws and jurisdictions such as ours or that of the United States.²

Secondly, the principle of nationality cannot be defended on its own ground. Difficulties ensue if a person is stateless or is a subject of several states.³ It is significant that German law, which adheres to the principle of nationality, has in the case of stateless persons (whose former nationality cannot be ascertained) to make concession to the territorial principle by providing that such cases shall be determined according to the law of the domicile. The Neo-statutists are in a further difficulty when called upon to explain why the capacity to conclude a contract is often governed by the law of the place where the contract is concluded and not by the personal law of the promisor, which from their point of view would appear to be more logical. If e.g. a person who is a minor according to the law of his nationality (state *A*) but an adult according to the law of state *B*, concludes a contract in the territory of state *B*, the obvious result is that he must be treated as having full capacity to conclude the agreement. The Neo-statutists attempt to avoid the impracticable result that follows from the application of their doctrine by attributing an extended and artificial importance to the conception of public policy (*ordre public*) which, in the doctrine of the Territorialists, operates as an ultimate reservation applying only if the foreign vested right is incompatible with the public policy of the *lex fori*.

On the whole, the school of the Neo-statutists appears to be still preoccupied with the old tug-of-war of the Statutists between what is the rule and what the exception.

¹ Cheshire, 3rd ed., 15-18.

² In 31 *L.Q.R.* (1915), 106; see *Re O'Keefe* [1940], 1 Ch. 124.

³ See p. 68, *post*.

C. The Territorialists. The Territorialist doctrine provides, it is conceived, an intrinsically sound approach to conflictual problems. According to this doctrine, the conflict of laws is considered to be part of the municipal legal system. Resort to a fiction is not necessary to explain the existence of the doctrine. The doctrine does not, however, provide an answer to all juristic problems connected with the subject. Two questions have to be distinguished. First: what is the authority from which a particular system of foreign law derives its claim to application in the municipal courts? Secondly, is there a general principle underlying the system of conflict of laws and, if so, what is that principle? It will be observed that the territorial doctrine provides a complete answer to the first question, but not to the second one. With respect to the second question, an attempt to find a solution exclusively on the territorial basis would result in the inadmissibility of any extra-municipal law,¹ and would stultify the ends which every system of conflict of laws is designed to serve. The answer to the second question is provided by the doctrine of vested rights, as developed by Dicey² and Professor Beale³ and as accepted by the English Courts.⁴

¹ Professor W. W. Cook, "The logical and legal Bases of the Conflict of Laws," in 33 *Yale Law Journal* (1924), 457; for an excellent exposition of Professor Cook's theory of "local rights" see W. R. Lederman in 25 *Canadian Bar Review* (1947), 799. The principal objection to this theory, apart from that stated in the text, is that it denies the recognition of a general principle underlying the system of conflict and explains the application of conflict rules by reference to "notions of policy, convenience and justice in the particular matter concerned" (Lederman, *op. cit.*, at p. 800).

² Dicey, 5th ed., "General Principles," I, pp. 19-20.

³ 1 Beale, 62-86.

⁴ p. 9, *ante*.

CHAPTER III

THE VESTED RIGHT

Since the English system of conflict of laws is concerned with the protection of vested rights,¹ it is important to ascertain the characteristics of a vested right in the technical sense in which the term is used in that branch of English law.

Two problems are involved in this investigation. First, it is necessary to determine the nature and quality of the right in issue and, for that purpose, to identify the legal system defining the character of that right. This examination is sometimes referred to as the classification,² qualification³ or characterisation⁴ of the right.⁵ We shall call it the *definition* of the right. The nature of the problem involved may be indicated by the following example.

The owner of a farm situate in state *A* but near the frontier of state *B* has his horses shod by a blacksmith whose smithy is situate in state *B*. Whilst the horses are at the smithy, the owner of the farm sells the farm to a third person. The contract of sale does not provide whether the horses in question are included in the sale of the farm or not.

Let us, further, assume that by the law of the state *A* the horses are deemed to be agricultural fixtures the title to which follows the title to the land, but that, according to the law of state *B*, the horses are regarded as personal chattels the title to which is independent of the title to the land.

Here, the decision of the problem whether the vendor or purchaser can claim the horses may depend on the definition (classification, qualification, characterisation) of the horses as immovables (agricultural fixtures) or movables (personal chattels).

After the right in question is duly defined, it becomes necessary to consider the second problem involved in the examination of the question whether a right is duly acquired by the claimant, i.e. the problem of *connection*. The task here is to determine the territorial law to which the right probably pertains, for that law alone is capable

¹ See p. 9, *ante*.

² W. E. Beckett: "The Question of Classification ('Qualification') in Private International Law," in 15 *B.Y.B.I.L.* (1934), 66 ff. E. G. Lorenzen, "The Qualification Classification and Characterisation Problem," 50 *Yale Law Journal* (1941), 743.

³ A. Mendelsohn-Bartholdi: "Delimitation of Right and Remedy in the Cases of the Conflict of Law," in 14 *B.Y.B.I.L.* (1935) 20.

⁴ A. H. Robertson, "Characterisation in the Conflict of Laws," *Harvard Studies in the Conflict of Laws*, Vol. IV, 1940; John D. Falconbridge, "Characterisation in the Conflict of Laws," in 53 *L.Q.R.* (1937), 235; W. W. Cook, "Characterisation in the Conflict of Laws," 51 *Yale Law Journal* (1941), 191.

⁵ A. H. Robertson uses, for some of the problems involved, the term "the preliminary question in the Conflict of Laws" in 55 *L.Q.R.* (1939), 565, and *op. cit.*, p. 135.

of creating such a right and vesting it in a person. We have to ascertain the "connecting factor"¹ and thus to locate the "seat" of the legal relationship existing between the parties, because only when the law governing the issue is determined is it possible to state precisely the rights which the parties have acquired. If, for instance—

a merchant trading in Gibraltar sells goods to a merchant carrying on business in Malta, and the purchaser claims rescission of the contract on the ground that the quality of the goods was inferior, the decision may depend on the question whether the law of Gibraltar or Malta determines the rights of the parties.²

The process of selecting the law applicable to the issue represents a problem of connection.

Logically, every problem pertaining to the conflict of laws involves of necessity the definition and connection of rights which in the allegation of the parties have been duly acquired by them. In practice, however, it is not always necessary to investigate both problems. Thus, in the first example no difficulty will arise with respect to connection, for when we have defined the horses as immovables, the generally recognised rule will apply that immovables are governed by the *lex situs*. In the second example no problem of definition is involved, for the contractual nature of the right in question is beyond doubt.

The right, when properly defined and connected, becomes a vested right in the technical sense in which the term is used in the English system of conflict of laws. It will then, as we have seen, be generally recognised by the English courts no matter whether it is acquired in accordance with English municipal law or with foreign law.

However, as there are cases where a right acquired under the municipal system of English law is unenforceable in England because its recognition would be contrary to public policy or statute law, so a right acquired under a foreign legal system may for the same reasons not be enforceable in the English courts. The rule, that every right properly acquired under a foreign legal system is recognised by the courts is qualified by the superior reservation that the courts will not admit any foreign right which infringes the general policy or some express enactment of the *lex fori*.

We shall now proceed to examine in detail, first, the definition of the right in question, secondly, its connection with a territorial legal system, and thirdly, the exceptions to the rule that vested rights are universally recognised by the Courts.

¹ A. H. Robertson, "Characterisation in the Conflict of Laws," in *Harvard Studies in the Conflict of Laws*, Vol. IV, 1940, p. 24.

² See *Benaïm & Co. v. Debono*, [1924] A.C. 514, and p. 120, *post*.

I. THE DEFINITION OF THE RIGHT. CLASSIFICATION AND CHARACTERISATION

1. THE FOREIGN DOCTRINES.

From the example on page 31 it is evident that the main problem of the definition of a right is to identify the legal system entitled to define the right under consideration. Text writers are not in agreement on this question. There is a strong tendency to reserve to the *lex fori* the definition of the legal nature of the right at issue. Professor Beale¹ and the American *Restatement*² support this view. The *Restatement* says—

In all cases where as a preliminary to determining the choice of law it is necessary to determine the quality and character of legal ideas, these are determined by the *forum* according to its law.

The French Professor F. Despagnet, on the other hand, holds that every right has to be defined according to the law under which it is created (*lex causæ*).³ According to this view, a foreign right is invariably defined by reference to the foreign legal system in question. Mr. Beckett, in a learned argument which has the support of Professor Cheshire, rejects both the *lex fori* theory and the *lex causæ* theory for the definition of the right. He maintains that the definition of the right has to be established in accordance with "analytical jurisprudence, that general science of law, based on the results of the study of comparative law which extracts from this study essential general principles of professedly universal application."⁴ A fourth doctrine is advanced by the eminent French scholar Professor Bartin⁵ and is accepted by the French jurists Arminjon,⁶ Pillet and Niboyet.⁷ Professor Bartin explains that the problem of the definition of rights is governed by two legal rules and not, as the supporters of the first three theories urge, by a single principle. According to Professor Bartin, it is first necessary to ascertain "the compartments of classification."⁸ This has to be done in relation to the legal conceptions prevailing at the *forum*. Subsequently, there arises the question of "details," a question of subsidiary qualification which is governed by

¹ 1 Beale, 55 and Lorenzen, 20 *Col. L. Rev.* 247.

² *Restatement*, para. 7 (a), p. II.

³ See *Chunet*, 1889, Vol. 25, at p. 253, 272.

⁴ Beckett in 15 *B.Y.B.I.L.* (1934), 59. Professor Rabel (*Chunet*, 1933, No. 1, pp. 1-62) and Professor Meriggi adhere to the same view.

⁵ In *Chunet*, 1897, p. 225, and in *Recueil de l'Académie de Droit International* 1930, Vol. I, p. 565. See A. H. Robertson, *loc. cit.*, pp. 34-5.

⁶ *Précis de droit international privé*, Vol. I (2nd ed.), 128-48.

⁷ *Manuel de droit international privé*, 1924, pp. 373-6.

⁸ *Recueil*, 1930, Vol. I, p. 579.

the *lex causæ*. Thus the question whether a distinction is drawn between movable and immovable property is left to the decision of the *lex fori*; but, provided the *lex fori* has incorporated this distinction into its legal system, the *lex causæ*, i.e. in the present example the *lex situs* of the property in issue, would determine under which of these categories the property falls.

2. THE ENGLISH DOCTRINE.

It is a remarkable fact, which has not passed unnoticed,¹ that the English doctrine draws a distinction similar to Professor Bartin's² famous doctrine. Dicey³ formulates the English doctrine as follows—

The incidents of a right of a type recognised by English law acquired under the law of any civilised country must be determined in accordance with the law under which the right is acquired.

Dicey draws here a distinction between the "type" and the "incidents" of the right. The definition of the former is to be established by English law as the *lex fori*. The definition of the latter is left to the foreign law as the *lex causæ*. This view, as we shall see, is supported by the principles laid down in English cases. It is for the *lex fori* to classify a right, to provide the categories and classes which in their aggregate constitute a legal system; and it is for the *lex causæ* to characterise the right in issue, to define the incidents or details of the right with a view to rendering possible the classification of the right in accordance with the legal system prevailing at the *forum*.

It is essential, if the problem of definition is to be approached scientifically, to distinguish between the classification and characterisation of the right.⁴ The rules of the English conflict of laws are as follows—

- (1) the classification of the right is effected in accordance with the *lex fori*.
- (2) The characterisation of the right is left to the *lex causæ*.

The classification of a right under the English system of conflict of laws coincides almost invariably with the classification of that right

¹ Dicey, 5th ed., "General Principle No. V," note (f) at p. 43; Lorenzen in 20 *Col. L. Rev.* 268; Beckett in *B.Y.B.I.L.* (1934), 53.

² Bartin is, as Professor Lorenzen (20 *Col. L. Rev.* 268) rightly remarks, a supporter of the territorial school. This explains why as regards the question of definition he arrives at substantially the same result as the English doctrine. The attitude to a matter of principle such as the definition of a right is obviously strongly influenced by the juristic attitude to the conflict of laws in general.

³ Dicey, 5th ed., "General Principle No. V," p. 43; see also Lord Greene, M.R., in *De Reneville v. De Reneville*, (1948), 64 T.L.R. 82, at p. 86.

⁴ These terms are, it is believed, more descriptive of the problems involved than the terms "primary" and "secondary" characterisation which are used by Cheshire, 3rd ed., pp. 63 *seq.*, and A. H. Robertson, *op. cit.*, pp. 24, 59, 118.

under the general law of England. A marriage, a contract, a tort, a company, a partnership—these and many other conceptions are identical, whether for the purposes of the general law or for the purposes of that branch of the law which deals with the conflict of laws. Exceptionally, however, English law provides categories under its system of rules relating to the conflict of laws which are not known or customary in other branches of English law. Thus, the important but technical division of property into realty and personalty in English internal law is abandoned, in the conflict of laws, in favour of another more natural division, namely into immovables and movables. A leasehold is, under the general English law, personalty; in the English conflict of laws it is considered an immovable.¹ After having analysed the essential constituents of a marriage, a contract, a tort, a company, a partnership, an immovable, etc., according to English law, we have to proceed to the characterisation of the issue on the basis of the *lex causæ*. In the case of institutions originating abroad, we have to examine the incidents and consequences attributed to them by the foreign law concerned. We are thereby enabled to compare the character of the foreign institutions with the classes of such institutions recognised by English law. We are then in a position to say whether a union between a man and a woman entered into abroad is a marriage in the English sense, whether a tangible object situate abroad is a movable or immovable, whether a combination of persons formed under foreign law is a company or partnership, etc.

3. ILLUSTRATIONS.

Let us now examine the operation of these rules in practice.

A. Monogamous and polygamous marriages. Suppose that the English courts have to decide whether a particular union between a man and a woman entered into abroad is a monogamous marriage within the meaning of English law. Such a decision would have important consequences, for if it does constitute such a marriage and is validly concluded, it is as fully recognised in the English jurisdiction as a marriage entered into in this country; in particular, the dissolution of the union might be subject to the jurisdiction of the English courts in matrimonial causes. If, on the other hand, the union cannot be defined as a monogamous marriage, its effect and consequences are, in the English jurisdiction, recognised for limited purposes only, and, in particular, English matrimonial procedure is not adapted to deal with its dissolution. In the present connection, it is sufficient

¹ *In Re Hoyles*, [1911] 1 Ch. 179, at p. 185. See p. 38, *post*.

to concentrate on the question: when is a union concluded abroad a monogamous marriage within the meaning of English law? The effect of such marriages, and of marriages which do not satisfy this test, will be considered later.¹

(a) THE CLASSIFICATION THEREOF. According to the rules stated above, we have first to ascertain the essentials attributed by English law to a monogamous marriage, because English law is the *lex fori*. These essentials are explained by Lord Penzance in *Hyde v. Hyde* ²—

Marriage has been well said to be something more than a contract either religious or civil, to be an institution. It creates mutual rights and obligations, as all contracts do but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? . . . I conceive that marriage, as understood in Christendom, may for this purpose be defined as a voluntary union for life of one man and one woman to the exclusion of all others.

Lord Penzance's analysis of marriage makes it clear that English law attributes full effect to the so-called Christian marriage only, i.e.—
*a voluntary union for life of one man and one woman to the exclusion of all others.*³

With this conception of marriage, polygamous marriages or unions entered into for a specified period of time are incompatible.

(b) THE CHARACTERISATION THEREOF. Having ascertained the essentials of a monogamous marriage according to English law, we have to turn to the *lex causæ* for the characterisation of the union at issue. The *lex causæ* is here the law of the place where the marriage was celebrated (*lex celebrationis*). We have, therefore, to examine the union in question according to the laws and customs prevailing at the place of the celebration of the marriage. If, according to the foreign *lex celebrationis*, the union both excludes polygamy and is intended to be of indefinite duration, it will be recognised as a "monogamous marriage" by the English courts.

Thus, in *Hyde v. Hyde*,⁴ the petitioner had married the respondent in Mormon territory in Utah (U.S.) according to Mormon rites. At that

¹ See pp. 291-3, and p. 277, *post*.

² *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130, 133.

³ This statement was accepted by Stirling, J. in *re Bethell: Bethell v. Hildyard* (1888), 38 Ch. D. 220, 234; by Sir James Hannen in *Brinkley v. A.G.* (1890), 15 P.D., p. 80; and further in *R. v. Hammersmith Superintendent Registrar of Marriages. Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 641; *Nachimson v. Nachimson*, [1930] P. 217.

⁴ (1866), L.R. 1 P. & D. 130.

time polygamy was part of the Mormon doctrine and was practised in Utah. Later, the petitioner renounced the Mormon faith and took up his domicile in England. When the respondent married again, the "husband" petitioned the English Court for a divorce on the ground of misconduct on the part of the respondent. Lord Penzance refused to grant a decree of divorce because the polygamous character of the Mormon union did not conform with the English notion of the Christian marriage and, in consequence, "the provisions adapted to our matrimonial system are not applicable to such a union."¹

Further,

In *Re Bethell*,² Bethell, a domiciled Englishman who resided in Bechuana-land (South Africa), went through a marriage ceremony with Teepoo, a girl of the Baralong Tribe, according to the rites of the tribe. The father of Bethell had left him the income of land situate in Yorkshire, with a remainder over to Bethell's "lawful children." After Bethell's death, the question arose whether Bethell's child born of his union with Teepoo was entitled to take under the will of the father of Bethell. Evidence was given that according to the Baralong custom "each male is allowed one great wife and several concubines who have almost the same status in the home as the great or principal wife." Stirling, J., held that Teepoo's child could not take under the will of Bethell's father because the Baralong union was polygamous in its nature and did not, therefore, agree with the essential characteristics of a marriage in the English sense.

On the other hand, if the *lex celebrationis* invests the union with incidents conforming to the essentials of the English marriage institution, and in particular, if that *lex* enjoins monogamy upon the spouses, the union will be recognised by the English court as a valid monogamous marriage though concluded in a non-Christian country, e.g. in Japan.³ Moreover, English law even regards as monogamous a marriage concluded in a non-Christian country under the rites of a law admitting polygamy if the spouses belong to a religious sect prescribing monogamy and if, in fact, they practise monogamy.⁴ In *Lord Sinha's Claim* ⁵—

the Committee of Privileges had to advise whether Lord Sinha was entitled to take his seat in the House of Lords as successor and heir of his father who had been the first Indian raised to the peerage of the United Kingdom.

The first Lord Sinha, who was domiciled in India, had married an Indian lady in India according to the rites of Hindu Law which admits polygamy. Both spouses belonged, however, to a religious sect prescribing monogamy as one of its main tenets and lived in fact in a monogamous union. No Indian Court would have recognised as valid a marriage of the first Lord Sinha to a second wife whilst he was a member of that sect which he never left.

¹ At pp. 135-6.

² In *Re Bethell* (1888), 38 Ch. D. 220.

³ *Brinkley v. A.G.* (1890), 15 P.D. 76.

⁴ In *Lord Sinha's Claim*, *H.L. Jour.*, 1939, Vol. 171, 350; and *Mehta v. Mehta*, [1945] 2 All E.R. 690. The same view was advocated, prior to these decisions, by Dr. S. G. Vesey Fitzgerald in "*Hyde's and Nachimson's Cases*" (1931), 47 L.Q.R. 253.

⁵ *H.L. Jour.*, 1939, Vol. 171, 350.

The Committee of Privileges decided that the marital union of the first Lord Sinha was monogamous in character and fully recognised as a marriage in the English sense, since the spouses were prohibited by their religion from practising polygamy and did in fact live in monogamy. Lord Sinha was, therefore, entitled to take his seat.

The second criterion in Lord Penzance's definition of the Christian marriage, namely the test of indeterminate duration of the marriage, is satisfied if at the time of the conclusion of the marriage the parties intended to enter into a union for life and not merely for a specified time. It is immaterial that the *lex celebrationis* admits the subsequent dissolution of the marriage by mutual consent or at the will of one party. This rule was established in *Nachimson v. Nachimson*.¹

In this case, the issue was whether a union contracted under Soviet law in 1924 constituted a valid marriage according to English law in spite of the fact that Soviet law permitted the dissolution of the marriage "by mutual consent or at will of either party with merely formal conditions of official registration." ² The Court of Appeal consisting of Lord Hanworth, M.R., Lawrence, L.J., and Romer, L.J., held that the facilities of dissolution accorded to the marriage by the *lex celebrationis* did not impair the character of a marriage which otherwise conformed with the English notion of this institution. The reason for this view was, first, that, according to the evidence in this case, the marriage lasted for life—and was intended by the parties when concluding the marriage to be unlimited in time—unless dissolved earlier in accordance with the competent law; and, secondly, that the dissolution of the marriage is not, on principle, governed by the *lex celebrationis* but by the law prevailing at the domicile of the husband at the time of the divorce petition.

B. Movables and immovables. The cases dealing with the distinction between movables and immovables provide a second illustration for the definition of a vested right.

(a) THE CLASSIFICATION THEREOF. It has already been mentioned ³ that the distinction between movables and immovables forms one of the exceptional cases where the conflictual classification does not coincide with the general classification of English law. The reasons for this divergence are explained by Farwell, L.J., in *In re Hoyles* ⁴—

The division into movable and immovable is only called into operation here when the English courts have to determine rights between domiciled Englishmen and persons domiciled in countries which do not adopt our division into real and personal property. In such cases, out of international comity and in order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under different systems of jurisprudence, our courts recognise and act on a division otherwise unknown to our law into movable and immovable.

¹ [1930] P. 217.

² P. 35, *ante*.

³ Headnote to *Nachimson v. Nachimson*.

⁴ [1911] 1 Ch. 185.

The rule that, for the purposes of the conflict of laws, the courts have abandoned the established classification between realty and personalty, has important consequences. This became evident in *In re Berchtold*,¹ where the issue was whether land situate in England and subject to a trust for sale was to be considered as an immovable under conflictual aspects though under the usual classification it would have been personalty, in consequence of the rule of equitable conversion applicable to land subject to a trust of sale. The facts of the case are complicated.

Count Richard Berchtold had left his freehold estate in Birmingham upon trust for sale and conversion. The beneficial interest in the land was vested in his son Count Nicholas during the latter's life. Count Nicholas died intestate and domiciled in Hungary. It then became necessary to determine whether the English freeholds were movables by operation of the equitable rule of conversion and in consequence distributable according to the law of Hungary as the *lex domicilii* of Count Nicholas, or whether they were to be regarded as immovables and, therefore, governed by English law as the *lex situs*. If the succession to the freeholds was governed by English law, the rule of equitable conversion would then apply as part of the general English law and the land would devolve on the persons who according to English law were the next of kin. Russell, J., held—

- (a) that the conflictual classification of English law was that into movables and immovables,
- (b) that English freeholds were clearly immovables.

The decision was based on the conflictual classification. The law applicable under that classification having been ascertained, the internal rules of English law were invoked and in consequence—

- (c) the English rule of equitable conversion was applied and the land devolved on intestacy as personalty to the next of kin.

The interesting feature of the *Berchtold* case is that the same equitable interests in English land were classified as immovables from the conflictual point of view, and as personalty from the point of view of general law.

To the rule that in the English conflict of laws the classification of property is into immovables and movables, and not into realty and personalty, two exceptions are admitted.

First, an English statute may expressly adopt the division of the general law, which then prevails over the conflictual classification. Thus, the Wills Act, 1861, (Lord Kingsdown's Act) provides that a will made by a British subject out of the United Kingdom in the form required by the law of the place where the will was made, shall be recognised as valid by the English courts, but only in so far as the

¹ [1923] 1 Ch. 192. See also the Irish Case *Murray v. Champenowne*, [1901] 2 I.R. 232.

will deals with the "personal estate of the testator."¹ Thus, in *Re Lyne's Settlement Trusts*,²

A female British subject who resided in France had made a holograph will which complied with the French form for such wills, leaving to a Frenchman all her possessions and all interests devolving on her on the death of her father. Under a settlement executed by her father the testatrix was entitled to English hereditaments which were subject to a trust for sale. The Court of Appeal held that the English land was part of "the personal estate" of the testatrix within the meaning of Lord Kingsdown's Act because it was subject to equitable conversion, and that in consequence it was validly devised under the holograph will to the Frenchman.

This decision is not at variance with the principle laid down in *In re Berchtold*,³ since the issue was limited to the interpretation of an English statute which had expressly adopted the classification of the general law (viz. into realty and personalty) and, consequently, no room was left for the conflictual division (viz. into immovables and movables).

The second exception to the rule that in the English conflict of laws the division of property is into immovables and movables and not into realty and personalty, arises when the foreign law already recognises the English division of property into realty and personalty and there is, therefore, no need to diverge from the general classification of English law.

The English conflict of laws recognises the division of property into immovables and movables only for the purpose of securing a common basis for adjudicating upon questions affecting both English law and those foreign systems of law which do not recognise the English division of property into realty and personalty. If a foreign legal system happens to concur with English law in the general classification, as is the case with many Dominion jurisdictions, the reason for the application of the special conflictual classification ceases to exist and the English courts revert to the general division into realty and personalty.⁴

(b) THE CHARACTERISATION THEREOF. The principle that the characterisation of a tangible object is effected by reference to the *lex situs* of the object in question⁵ is illustrated by the cases concerning debts secured on land. The English courts have repeatedly had to consider this problem in connection with the so-called *Scottish heritable bonds*.

¹ We shall consider this Act later at pp. 230, 239.

² [1919] 1 Ch. 80; See also: *Re Cartwright, Cartwright v. Smith*, [1939] 1 Ch. 90; in *Re Culliffe's Will Trusts*, [1939] 1 Ch. 565, 571.

³ [1923] 1 Ch. 192.

⁴ In *Re Hoyles*; *Row v. Jagg*, [1911] 1 Ch. 185.

⁵ In *Re Culliffe's Will Trusts*, [1939] 1 Ch. 565, 571.

These bonds are instruments under which the debtor undertakes to pay the creditor a sum of money and at the same time transfers land to the creditor as a security for the proper discharge of the obligation. It is obvious that the conveyance of land situate in Scotland is governed by *Scottish* law as the *lex situs*, but the crucial question is whether the debt which is included in the document is governed by the law applicable to movables or immovables.¹ The problem could also be stated in the following terms: Has the debt a separate existence in law or has it to be regarded as part of a complex transaction which is governed by the superior law of the *situs* of the land? This problem which is clearly a problem of characterisation was decided by the English courts in accordance with the law of Scotland. The English courts adopted the Scottish doctrine that the debt secured by a heritable bond has the character of an immovable.² This principle applies also to other cases where a money debt is secured on foreign land by way of mortgage or charge and is considered by the foreign law in question as immovable, since in these cases "it seems impossible to sever this personal covenant from the mortgage provisions which secure it."³ It has, however, been held that, if a heritable bond is given as an *additional* security for a separate debt contracted in England, the principal (English) debt does not merge into the debt covered by the bond but preserves its separate existence as a movable.⁴

¹ The question was of particular interest before 1 January, 1926, when succession on intestacy was different in case of real estate and personality. A good illustration of the problems involved is provided in *Drummond v. Drummond* (referred to by Sir William Grant, M.R., in *Brodie v. Barrie* (1813), 2 V. & B. 127, 132): "In *Drummond v. Drummond* a person domiciled in England, had real estate in Scotland; upon which he was granted a heritable bond to secure a debt contracted in England. . . . He died intestate and the question was by which of the estates this debt was to be borne. It was clear that by the English law the personal estate was a primary fund for the payment of debts. It was equally clear that by the law of Scotland the real estate was a primary fund for the payment of the heritable bond. Here was a direct *conflictus legum*. It was said for the heir that the personal estate must be distributed according to the law of England and must bear all the burdens, to which it was by that law subject. On the other hand it was said that the real estate must devolve according to the law of Scotland and bear all the burdens to which it was by that law subject. It was determined that the law of Scotland should prevail and that the real estate must bear the burdens."

² *Re Fitzgerald; Surman v. Fitzgerald*, [1904] 1 Ch. 573; *Johnstone v. Baker* (1817), 4 Madd 474 (footnote); *Jerningham v. Herbert* (1829), 4 Russ 388; *Allen v. Anderson* (1846), 5 Hare 163; *Drummond v. Drummond*, see note 1, *supra*.

³ *Per curiam* in *Mount Albert B.C. v. Australasian Temperance & General Mutual Life Assurance*, [1938] A.C. 224, 238; see further Dicey, 5th ed., p. 581, note (f).

⁴ *Cust v. Goring* (1854), 18 Bear. 383; *Duchess Dowager Buccleugh v. Hoare* (1819), 4 Madd 467. Scottish heritable bonds are to-day, in certain cases, e.g. under the Titles to Land Consolidation (Scotland) Act, 1868, s. 117, considered as forming part of the movable assets of the deceased creditor.

A particularly instructive illustration of characterisation is provided by the old cases dealing with slaves working on an estate. In *Ex parte Rucker*,¹ an English Court considered slaves working on a Jamaican estate as appurtenances of the estate and held that under a devise of the estate the property in the slaves had been transmitted to the devisee. The reason for this decision was that Jamaican law attributed this particular status to the slaves. In an American case,² slaves had been transferred to a state where the law regarded them as movable property and, consequently, the court treated them as such. Further examples of the rule that the characterisation is effected by reference to the *lex situs* of the property in question are provided by English leaseholds³ or English mortgages⁴ which are alike considered as immovables in the conflictual sense.⁵ In France, the courts held that a mining concession in Imperial Russia was to be treated as a movable because Russian law attributed this character to it.⁶

C. Corporations and partnerships. A third example of the problems involved in the definition of a right is provided by the cases determining the character of a trading association created under foreign law. English law recognises two types of business combination, namely the corporation and the partnership. The first combination forms a separate legal entity, liable to its creditors to the extent of the corporate stock. The second combination exhibits neither the incidents of corporateness nor those of limited liability.⁷ In some foreign countries, e.g. in France and Italy, the law recognises a particular form of commercial partnership with incidents which make it an intermediate type between the corporation and the ordinary partnership. In those countries the commercial partnership is regarded as a separate legal entity though the partners are fully and directly liable to the creditors. Similarly the separate *persona* of the trading association was recognised by the old law of Scotland before the Companies Consolidation Acts.⁸ It is not surprising that this con-

¹ (1834), 3 Deac. & Ch. 704; the same view was taken in the American case *McCullum v. Smith* (1838), Meigs 342 (Tenn.) quoted in 2 Beale 933; Minor s. 13, p. 39; Goodrich, p. 333 n. 1.

² *Cardwell v. Cardwell*, 37 Missouri 350.

³ *Freke v. Carbery* (1873), L.R. 16 Eq. 461.

⁴ In *Re Hoyles: Row v. Jagg*, [1911] 1 Ch. 185.

⁵ See p. 162, *post*.

⁶ *Messimy v. The Registry* (Court of Cassation, France) (1887), Clunet 815; Beale, Cases, Vol. II, 6.

⁷ "The firm style of a partnership is merely 'a name descriptive' of the partners used for the sake of brevity," *per* Buckley, L.J., in *Von Hellfeld v. Recknitzer & Mayer Frères & Co.*, [1914] 1 Ch. 753.

⁸ See Lord Colonsay in *Oakes v. Turquand* (1867), 2 H.L. 377.

ception of the commercial partnership has evoked discussion in the English courts.

In *General Steam Navigation Co. v. Guillou*,¹ an action was brought in respect of the negligent navigation of a French ship which collided with an English ship. The French ship belonged to a company styled "La Compagnie des Paquebots à Vapeur entre Le Havre et Londres." One of the proprietors of the company was sued individually. His defence was, *inter alia*, that he could not be sued individually; that he was only a shareholder in the company; and that the ship was the property of the company. The Court of Exchequer applied the English classification of corporations and partnerships, and, then, examined the characteristics attributed by French law to the *compagnie*. Lord Abinger, C.B., and Alderson, B., decided that the rather ambiguously worded defence meant that the association was a partnership and that according to French law all partners had to be joined as defendants; and that, thus interpreted, the defence was not good in law because the joinder of parties depended upon a procedural rule and was, therefore, governed by English law as the *lex fori*. Parke, B., and Gurney, B., on the other hand, held that the plea meant that the *compagnie* was, according to French law, a corporation. Under this construction the defence pertained to the substantive law and was admissible in the English Courts.

D. Further illustrations. The examples mentioned above do not exhaust the cases where the problems of classification and characterisation of vested rights have been in issue in English courts. Professor Cheshire refers, *inter alia*, to the case of the revocation of a will by subsequent marriage;² here the question arises whether the rule of English law, that a will is considered as revoked if the testator marries after having made the will, forms part of the matrimonial or testamentary law. There are indeed numerous illustrations of cases where the issue has been the definition of a right in the conflictual sense. Thus, it has further been considered whether a foreign enactment falls under the class of foreign "penal laws" which are not recognised by the English courts;³ whether a gift is a gift *inter vivos* or a *donatio mortis causa*;⁴ whether an instrument is an unconditional bill of exchange or merely a conditional promise;⁵ whether a claim based on foreign law is of quasi-contractual or delictual character;⁶ and whether the presumption as to *commorientes* is part of the substantive law or part of the law of evidence.⁷

¹ (1843), 11 M. & W. 877.

² Cheshire, 3rd ed., 68; *In re Martin*, [1900] P. 211.

³ *Huntington v. Attrill*, [1893] A.C. 150.

⁴ *In Korvine's Trusts*, [1921] 1 Ch. 343.

⁵ *Guaranty Trust Company of New York v. Hannay & Co.*, [1918] 1 K.B. 43; 2 K.B. 623.

⁶ *Baithyany v. Walford* (1887), 36 Ch. D. 269; see H. C. Gutteridge and K. Lipstein, "Conflicts of law in matters of Unjustifiable Enrichment," 7 *Cambridge Law Journ.* (1939), 80; Falconbridge, p. 356.

⁷ *In re Cohn*, [1945] Ch. 5.

The universal nature of the problem of definition may be seen from the following example. The trichotomy of legal relations under the English system of law as legal rights, equitable interests and obligations does not coincide with the dichotomy of continental jurisprudence based on the Roman division of legal relations into rights *in rem* and rights *in personam*. Many continental jurisdictions have, therefore, been faced with the problem how to define the English conception of an equitable interest, a point which has arisen particularly in connection with trusts.¹ The continental courts have invariably taken their stand on their own classification and attempted to subject the strange conception thereto.

II. THE CONNECTION OF THE RIGHT

After the right in issue has been properly defined it has to be connected with the law of a legal unit which law then governs the validity and extent of that right.

1. GENERAL OBSERVATIONS.

The problem of connection again raises a question of the choice of law and, all preliminary issues having already been disposed of, raises it in the purest and simplest form possible. Since it would therefore be correct to assert that the problem of connection coincides with that of the choice of law² it has become customary to use these terms interchangeably.³ This terminology is innocuous if it is remembered that this use of the term "choice of law" refers to a particular instance of the process of selecting the law applicable, and that other conflictual issues render equally necessary a choice of law.⁴

The object of connection is, to use the language of Savigny—

to discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat).⁵

The conflict of laws—as all law—is concerned with legal relations existing between persons, or between persons and things. That explains why the same facts of life may be subject to different conflictual rules. The legal estate in foreign land is governed by the *lex situs*, whereas equitable interests in the same land represent other legal relations which may be subject to the jurisdiction of the English courts

¹ See F. Weiser, *Trusts on the Continent of Europe*, London, 1936; W. W. Land, *Trusts in the Conflict of Laws*, New York, 1940.

² But it would be inaccurate to reverse this statement since disputes concerning the definition of rights also involve a choice of law.

³ See the general arrangement of the treatises of Dicey, Prof. Beale, Prof. Cheshire.

⁴ See p. 7, *ante*.

⁵ Savigny, *op. cit.* (transl. Guthrie), Sect. XVII, para. 360, p. 89.

because "equity acts *in personam*." Further, a contract concluded in London and to be performed in Paris may be subject to English law in respect of the interpretation of the promises of the parties, but may be governed by French law with respect to the performance of their obligations.

Though the subject-matter of a conflictual issue is always a legal relation, or, as it is usually termed, a right, the factual circumstances giving rise to the right are of great importance for the problem of connection. From these facts a choice has to be made with a view to ascertaining the "connecting factor,"¹ i.e. the circumstance which is decisive in determining the choice of law. The most important of these circumstantial facts are—

- (1) The domicile² of any person concerned in the legal relation (*lex domicilii*),
- (2) the place where a thing which is the object of the legal relation is situated (*lex situs*),
- (3) the place of a juridical act, which has been or is to be done (*lex actus*),
- (4) the place of the tribunal which has to decide the law suit (*lex fori*).³

Fortunately, it is not in every case necessary to examine the whole gamut of factual incidents affecting the issue. In a few instances, statutes contain express provisions as to the law applicable to the issue.⁴ Mostly, however, the choice of law has to be effected in accordance with general principles of law, and here three classes of cases can be distinguished: in many instances, the legal inference from the facts is stereotyped and so generally accepted that the choice of law will not offer any difficulty; under this category fall the rules that the title to, and the possession of land are governed by the *lex situs*; that procedural matters are determined by the *lex fori*; and that the internal affairs of a corporation are subject to the law creating the corporation. In other instances the choice of law may be in dispute for a group of legal relations, e.g. it may be doubtful whether rights relating to movables are subject to the personal law of the assignor or to the *lex situs* of the movables or to the law prevailing at the place where the right has been acquired (*lex actus*); once the

¹ A. H. Robertson, in "Characterisation in the Conflict of Laws," *Harvard Studies in the Conflict of Laws*, Vol. IV, 1940, p. 24. See also M. Wolff, p. 98, on "Points of Contact."

² Savigny does not employ this term in the same meaning as it has been used in English law as explained at p. 65, *post*.

³ Savigny, *op. cit.* (transl. Guthrie), Sect. XVIII, para. 361, p. 96.

⁴ J. H. C. Morris, "The Choice of Law Clause in Statutes," (1946) 62 *L.Q.R.*

connection for the group of factual circumstances has been determined, the solution of the problem of the choice of law becomes as simple in the individual case as it is when the legal inference from the facts is stereotyped. In a third class of cases, the rules of the English conflict of laws require a close examination of the facts of every individual case; thus, the determination of the domicile of a person or of the proper law of a contract entails a careful scrutiny of the whole array of relevant facts in every individual case. Whether we have to deal with choice of law clauses in statutes, or with stereotyped connection, group connection or case connection, the essence of the analytical process involved is always the same; a choice of law.

The problem of connection, unlike that of definition, is too multi-form to admit of the deduction of any general principle. To use Savigny's words,¹ it belongs to the practical rather than to the theoretical part of the subject. We shall reserve the detailed investigation of this problem to the subsequent chapters which deal with the choice of law.

2. DOMICIL AS A PROBLEM OF CONNECTION.

There is, however, a problem of connection which has a general character. Many issues pertaining to different provinces of the conflict of laws resolve themselves into the central quest of the personal law of the individual whose rights are in issue (the *de cuius*, as he is generally called). English and American law consider the law prevailing at the place where the *de cuius* has or is deemed to have his permanent home (the law of the domicile) as the legal system governing his personal relations. Though logically an exposition of the law of domicile would be pertinent to the consideration of the problem of connection, it is more convenient first to conclude the analysis of the characteristics of a vested right and to revert to the law of domicile later.²

3. CAPACITY AS A PROBLEM OF CONNECTION.

Another problem of connection which is of general character is the often discussed question whether the capacity* of a person to enter into a legal relation is governed by a uniform principle, and if so what this principle is. Considerations of capacity arise in many branches of the conflict of laws, e.g. it will be necessary to examine

* For further reading: C. K. Allen, "Status and Capacity," in (1930) 46 *L.Q.R.*, 277; Dicey, 5th ed., "Comment to Rule 136," p. 531.

¹ Savigny, *op. cit.* (transl. Guthrie), Sect. XVII, para. 360, p. 89.

² See p. 65, *post*.

later whether a person is capable of concluding a contract, of transferring or mortgaging land, of assigning movables, of taking under a will or on an intestacy, of making a will, of marrying and so forth.

Those who assert the existence of a general principle underlying the ascertainment of the capacity of persons to enter into legal relations in no wise agree what this principle is. Some hold that capacity is merely an aspect of the civil status of a person and is, in consequence, governed by the "personal law of the *de cuius*," i.e. the law of domicile. Others maintain that capacity is determined by the place where the legal act in question is sought to be performed, i.e. the *lex actus*; they argue that this result is required by the public policy of the *lex actus*.

"The overwhelming majority of the older writers on private international law held that the *lex domicilii* as to capacity was a personal law which adhered to the individual wherever he went and whatever obligations he undertook; and under this body of opinion stands the great authority of Savigny."¹ The English authorities are conflicting; but it is possible to discern a tendency to consider status as dependent on domicile subject to "very wide exceptions."² This tendency was noted by Lord Westbury in *Udny v. Udny*³—

For it is on this basis—i.e. on the basis of the civil status—that the personal rights of the party, that is to say, the law which determined his majority or minority, his marriage, succession, testacy or intestacy, must depend.

The same principle can be deduced from *dicta* of Cotton, L.J., in *Sottomayor v. De Barros*⁴ and Lord Halsbury, L.C., in *Cooper v. Cooper*.⁵

Story, on the other hand, advocates the view that capacity is governed by the *lex actus*. He says⁶—

In regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation and other personal qualities and disabilities, the law of the domicile of birth or the law of any other acquired and fixed domicile is not generally to govern, but the *lex contractus aut actus*, the law of the place where the contract is made or the act done.

This theory has the support of Sir Cresswell Cresswell, who said in *Simonin v. Mallac*⁷—

In general the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract was made.

¹ Allen, *loc. cit.*, p. 294.

² Dicey, 5th ed., Comment to Rule 136, p. 532.

³ (1869), L.R. 1 Sc. App. 441, 457.

⁴ (1877), 3 P.D. 1, 5; followed in *In re Cooke's Trusts* (1887), 3 T.L.R. 558; see also: *In re De Wilton*, [1900] 2 Ch. 481, 492.

⁵ (1888), L.R. 13 App. Cas. 88, 99.

⁶ Story, s. 103.

⁷ (1860), 2 Sw. & Tr. 67.

Lord Hannen in *Sottomayor v. De Barros* (2),¹ and Lord Gorell in *Ogden v. Ogden*,² were also in favour of this doctrine. This view is further supported by American authority³ and it coincides in general with Dr. Allen's conclusions.⁴

These two conflicting schools of thought concur in one point, namely in the assumption that the conception of capacity exhibits a common principle in the various branches of law. They are in disagreement only with respect to the nature of this principle. However, it may well be doubted whether capacity is governed by a general principle at all or whether it is not merely of an incidental character, not differing in quality from other incidents of a legal act, such as form, essential validity, performance of an obligation, dissolution of a marriage and so on. If we take this simple view, it is not necessary to subscribe to either of the two conflicting doctrines. We should then simply admit that no general principle can be deduced from the various occasions where capacity is in issue. This result would not even be regrettable on grounds of theory for, if capacity is merely of an incidental character, it should not be treated differently from the other incidents of a legal relation which obviously are not governed by the same law in all instances. Professor Beale states the incidental character of capacity in the following passage⁵—

Capacity is not a status at common law. It is a quality of a transaction and at common law is governed by the law that governs the whole transaction.

The view that the rules governing capacity are not based on a general principle and that capacity on the contrary is but an ordinary incident of a legal transaction is, it is believed, most appropriate to the theory of the Common Law and is further supported by weighty *dicta* in English authorities. Lord Macnaghten observed in *Cooper v. Cooper*⁶—

It may be that all cases are not to be governed by one and the same rule;

and Lord Greene, M.R., said in *Baindail v. Baindail*⁷—

There cannot be any hard and fast rule relating to the application of the law of domicile as determining status and capacity for the purpose of transactions in this country.

¹ (1879), L.R. 5 P.D. 94, 100.

² [1908], P. 46; see also *Re Hellman's Will* (1866), L.R. 2 Eq. 363; *Chetti v. Chetti*, [1909] P. 67.

³ *Polydore v. Prince* (1837), Ware 402; Beale, Cases, I. 738; *Moliken v. Pratt* (1878), 125 Mass. 374; Lorenzen 283.

⁴ 2 Beale, 660; see also Dicey, 5th ed., p. 532.

⁵ (1888), 13 App. Cas. 88, 108.

⁷ (1946), P. 122, 128.

The various kinds of capacity will therefore be considered in subsequent chapters which will deal with the respective transactions in question. The capacity to conclude a contract will be examined in the exposition of the law of contracts, the competency to marry in that on marriage and so forth.¹

III. EXCEPTIONS TO THE RULE OF THE PROTECTION OF VESTED RIGHTS

A vested right, i.e. a right properly defined and connected, is recognised in the English courts no matter whether the right is acquired under English or foreign law.² This is the fundamental principle underlying the English system of the conflict of laws. However, most legal principles admit of exceptions, a concession to the fact that life is much too multiform to be entirely governed by the rigid pre-scripts of logic. The law of torts is guided by the postulate *nulla injuria sine damno*, and yet conflicting interests within the community render it necessary to admit not a few cases where there is "*injuria sine damno*" or "*damnum sine injuria*."³ "Still, it should be borne in mind that exceptions are exceptional—a truism which is constantly overlooked—and are in truth of far less importance than the rule which they modify or limit."⁴ With respect to the conflict of laws, the exceptions to the general rule are fortunately small in number.

Before proceeding to examine these exceptional cases, a practical conclusion should be drawn from the position occupied in English law by the doctrine of the vested right. This conclusion takes the form of a rebuttable presumption in law. Whenever it is proved that a

¹ A few words must be added with respect to the status doctrine. It is said that capacity is an aspect of the status of a person and that, since status is governed by the *lex domicilii* as the personal law, capacity should be subject to the same law. The fallacy of this argument consists, it is submitted, in the fact that there is not one status but a multitude of them. Dr. Allen (46 *L.Q.R.* 284) enumerates no less than 18 kinds of status ranging from sex and minority to profession and criminality. It is not obvious what these kinds of status have in common. If there are 18 kinds of status, why should there not be 18 (or more) different species of capacity? The different result arrived at by the status school finds its explanation in a confusion of civil status (as contrasted with political status; see Lord Westbury in *Udny v. Udny*) with familial status. The truth is, it would appear, that "status" in its legal sense never advanced beyond its literal meaning which is as general and untechnical as the terms "relation" or "right."

² See Dicey, 5th ed., p. 24 on the difference between the recognition and the enforcement of a foreign right.

³ Salmond, *Torts*, 10th ed., 1945, pp. 14-18.

⁴ Dicey, 4th ed., 32-3; see also the personal reminiscence of the teaching of Professor Dicey by du Parcq, L.J., in *Kleinwort Sons & Co. v. Ungarische Baumwolle* (1939), 108 *L.J. K.B.* 861, 865.

right is duly acquired under a foreign system of law, that right will *prima facie* be protected in the English courts. A party arguing that it ought not to be protected has to show why protection should be refused. The courts will lean strongly in favour of the principle of protection of the vested right.

The exceptions to the vested right doctrine can be classified into two groups. In some instances, Parliament has expressly abrogated the general principle. The statutory exceptions to the rule do not exhibit a common feature. They are dictated either by the desire to protect British interests arising abroad or by expediency. The second group of exceptions is based on the Common Law. They are the outcome of the elementary rule that the law will not recognise private rights which are incompatible with the social institutions which it is called upon to protect. This ultimate reservation is "in theory inevitable,"¹ it is a rule of self-defence of the *lex fori* and is, as such, incorporated in every legal system. The Code Napoléon contains the significant phrase—

Laws concerning *l'ordre public et les bonnes mœurs* cannot be modified by any private agreement.²

Though English law corresponds in this respect substantially with French law, it would be misleading to state the English rule in terms similar to the provisions of the Code Civil. "Public policy" has a narrower meaning than "*l'ordre public*." The rule that foreign rights contrary to English public policy will not be recognised in the English courts covers only one aspect of a principle of much wider application and is only the conspicuous expression of an element which underlies the whole system of municipal law. "As has been often said, private international law is really a branch of municipal law, and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored."³ The exceptions admitted by the Common Law to the recognition of the doctrine of the vested right should, therefore, be subdivided into two categories. First, foreign rights may be of a substantially political character and may for this reason be excluded from recognition in the English courts. Thus, the English courts will not play the role of tax collectors to foreign sovereigns or carry foreign penal laws into execution. Secondly, clashes between English and foreign institutions may occur in the

¹ Westlake, 7th ed., p. 51.

² Art. 6 of the French Civil Code. Similar provisions are contained in the Italian Code, Art. 11; see Westlake, 7th ed., p. 51; and in the German *Einführungsgesetz* to the Civil Code, Art. 30.

³ *Per* Lord Parker in *Dynamit A.G. v. Rio Tinto Co.*, [1918] A.C. 292, 302.

social rather than the political sphere. Hereunder fall not only foreign laws contravening English public policy in its technical meaning but also foreign rights dependent upon social institutions unknown to or not recognised by English law. Thus, the English courts will not adopt foreign discriminations depending upon differences of colour, caste, or class, or upon differences in civil status such as slavery or civil death, or those arising out of religious persecution.

1. FOREIGN RIGHTS AFFECTED BY AN IMPERIAL STATUTE.

The number of statutory encroachments on the principle of vested rights is comparatively small. Three notable examples are provided by the Wills Act, 1861 (Lord Kingsdown's Act), the Foreign Marriage Acts, 1892-1947, and the Matrimonial Causes Act, 1937. These enactments have altered the rules of the Common Law on the conflict of laws. According to the Common Law, a will has to comply with the form prescribed by the law prevailing at the testator's domicile at the time of his death; otherwise the will is regarded as void.¹ This rule works hardship on a testator who has changed his domicile to a country that prescribes more elaborate forms for the making of a will than the one which he has left. In France, for instance, a will can be made in the holograph form, but according to English Common Law this will becomes invalid if the testator subsequently abandons his French domicile and acquires an English domicile which continues at the time of his death. Lord Kingsdown's Act has, as we shall see later, altered this position considerably.² With regard to marriage, the formal validity of a marriage is at Common Law governed by the law of the place where the marriage was celebrated unless the marriage took place in an uncivilised community.³ The Foreign Marriage Acts, 1892-1947 have altered this: now all marriages between parties of whom one at least is a British subject solemnized in any foreign country or place by a marriage officer within the meaning of the Act are valid in law.⁴ Thirdly, according to the Common Law, the English courts are unable to entertain matrimonial causes unless the domicile of the husband is within the jurisdiction of the courts. This rule is said to be based on the old view that husband and wife are one person in law.⁵ This rule often worked great hardship on a wife who had been deserted by her husband and had petitioned the Court for a decree of divorce. If the husband had abandoned his

¹ *Bremer v. Freeman* (1857), 10 Moo. P.C. 306.

² See below, pp. 230, 239, *post*.

³ See below, p. 303, *post*.

⁴ S. 1 of the 1892 Act.

⁵ *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, 460; see p. 310, *post*

English domicile, the courts could not grant the decree, though the husband's whereabouts might be unknown to the wife and she might, therefore, have been unable to start proceedings in the competent court. The Matrimonial Causes Act, 1937, remedied this hardship by providing that, where a wife has been deserted by her husband or where her husband has been deported from the United Kingdom, the husband having been immediately before the desertion or deportation domiciled within the jurisdiction, the courts shall have jurisdiction to entertain a matrimonial cause notwithstanding any change in the domicile of the husband subsequent to the desertion or deportation.¹ Another example of a statutory abrogation of a right vested under a foreign system of law is provided by Sect. 72 (2) of the Bills of Exchange Act, 1882, which enacts that an indorsement on an inland bill, if effected in a foreign country, is, as regards the payor, to be interpreted according to the law of the United Kingdom.² This provision may affect adversely the position of an indorsee to whom the bill was indorsed abroad by an indorsement which was good according to the *lex actus* but bad according to English law. The reasons for this enactment are apparently commercial convenience and the protection of English parties to the bill.

It should be noticed that these enactments of the Imperial Parliament command obedience only in the courts under its jurisdiction and do not pretend to address themselves to the courts of a foreign sovereign.³ They are not intended to have and do not have any extraterritorial effect. To construe them otherwise would be against the territorial doctrine according to which every sovereign is presumed to legislate for his own territory only.⁴

2. FOREIGN RIGHTS NOT ADMITTED BY COMMON LAW.

A. Foreign rights of a substantially political character. The foreign rights which belong to this category have this feature in common that they are of an essentially political nature. The meaning of this phrase which is employed here in a rather comprehensive sense, has been happily described by the American *Restatement* ⁵—

No action can be maintained on a right created by the law of a foreign state as a method of furthering its own governmental interests.

¹ *Ibid.*, s. 13.

² See p. 140, *post*.

³ See *per curiam* in *Canadian Pacific Ry. Co. v. Parent*, [1917] A.C. 195, 205-6.

⁴ See pp. 4, 27, *ante*, *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A.C. 670. *Tallack v. Tallack*, [1927] P. 211; *Scrimshire v. Scrimshire* (1752), 2 Hagg. Con. 395, 407.

⁵ Para. 610, p. 728; see further paras. 610-11; 3 Beale, 635-8, No. 6102.

This exception finds its explanation in the sad truism that the political aims of modern nations are often in disagreement. The public law of a particular state is too closely connected with the fluctuating politics of that state to be acceptable to the courts of another sovereign. The control of the political relations with other states is left to the political authorities of the state. It would be embarrassing to the judiciary of a state to take into consideration the fact that their decisions might involve their sovereign in a political dispute with another sovereign.¹

To the category of political laws of a particular state belong, as the American *Restatement* expresses it, all enactments serving primarily and substantially the governmental interests of that state. They may directly affect the constitution or administration of that state, or may be of a fiscal nature like revenue laws or may have a penal character. It is obvious that no person would attempt to enforce particular laws affecting the constitution or administration of a state in the courts of another state, but he may very well seek to enforce in other countries the revenue and penal laws of the particular state.

(a) THE REVENUE CASES. The practical operation of these rules will first be illustrated by the so-called revenue cases. Lord Mansfield observed in *Holman v. Johnson*:² "No country ever takes notice of the revenue laws of another." Further—

In *re Visser*; *H.M. The Queen of Holland (Married Woman) v. Drukker and others*,³ the Queen of Holland claimed succession duty under a Dutch Revenue Act from the defendants who were the personal representatives of a Dutch subject who had died domiciled in Amsterdam. The action was dismissed. Tomlin, J., held "there is a well recognised rule, which has been enforced for at least two hundred years or thereabouts⁴ under which these Courts will not collect the taxes of foreign states for the benefit of the sovereigns of those foreign states."⁵

The rule that foreign revenue laws are not enforceable in the English courts should not be construed too narrowly.⁶ It has been laid down in *Municipal Council of Sydney v. Bull*⁷ that the rule extends even to municipal contributions.

The Municipal Council of Sydney was empowered under a statute of

¹ Scrutton, L.J., in *Aksionairnoye Obschestvo A.M. Luther v. Sagor*, [1921] 3 K.B. 532, 539. ² (1775), 1 Cowp. 341. ³ [1928] 1 Ch. 877.

⁴ The cases alluded to are: *Boucher v. Lawson* (1734), *Cas. temp. Hard.* 85, 194; *Holman v. Johnson* (1775), 1 Cowp. 341. ⁵ At p. 884.

⁶ It should be noted that these cases deal only with attempts to claim foreign revenue in the English jurisdiction. The English courts would recognise foreign revenue laws which invalidate or render illegal a contract governed by those laws, but offending against their provisions; *Alvez v. Hodgson* (1797), 7 T.R. 241, see p. 116 *post*; *Foster v. Discroll*, [1929] 1 K.B. 479, see p. 123 *post*.

⁷ [1909] 1 K.B. 7.

New South Wales to ask the owners of certain property in Sydney for contributions towards improvements in the area. In case of default, the Council was authorised to distrain upon the goods of the owner or to recover the contribution by way of action.

The Council brought an action in the English Courts in order to enforce its rights under the New South Wales Act against the defendant who owned property in Sydney. Though it was plain that the defendant was liable under the Statute, Grantham, J., dismissed the action because it was "in the nature of an action" for a penalty or to recover a tax; "it is analogous to an action brought in one country to enforce the revenue laws of another."¹

(b) THE PENAL LAW CASES. The rule that foreign penal laws are not admitted in the English courts was early developed. Already in 1789, Lord Loughborough said²—

The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in this country by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend.

However, "suits somewhat loosely described as penal"³ include only proceedings involving offences against the state, "penalties . . . recoverable at the instance of the state"⁴ or at the instigation of a public prosecutor or common informer. Penalties due under private agreements or bonds do not come within the orbit of this rule because they are not of that political nature which justifies this exception.⁵ It is, on the other hand, sufficient if the proceedings are *substantially*⁶ concerned with the enforcement of punishment inflicted by the state; a case would not be exempted from the rule if the state attempted to enforce enactments of a penal nature indirectly under the disguise or in the shape of a civil suit.⁷

The following examples illustrate these rules.

In *Folliott v. Ogden*⁸ an action was brought in England on a bond which was executed in 1769 in New York. Both the creditor and the debtor resided in the United States. In the subsequent War of Independence, the plaintiff was attainted by a law of the State of New York of the offence of adhering to the enemies of that state and his real and

¹ At p. 12; see further *Indian and General Investment Trust Ltd. v. Borax Consolidated Ltd.*, [1920] 1 K.B. 539.

² In *Folliott v. Ogden* (1789), 1 H.Bl. 123, 135.

³ *Per curiam* in *Huntington v. Attrill*, [1893] A.C. 150, 155.

⁴ *Ibid.*, pp. 157, 158.

⁵ It appears that in America penalties included in a bond or penal damages are not recoverable in another jurisdiction. See *Restatement*, Para. 611, p. 730.

⁶ *Per Lawrence, J.*, in *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140, 143.

⁷ *Per curiam*, in *Huntington v. Attrill*, [1893] A.C. 150, 156.

⁸ (1789), 1 H.Bl. 123; (1790), 3 T.R. 726.

personal estate was forfeited to the people of New York. On the plaintiff bringing an action in the English courts for the payment of the debt, the defendant pleaded that, in accordance with the Statute of New York, the debt was forfeited to the State of New York and the defendant divested of it. The Court held that the confiscation was effected in pursuance of a penal law and was, therefore, without territorial effect. The words of Buller, J., declining to limit this rule are significant: "It would be attended with peculiarly serious consequences in the present state of Europe; since then the property of foreigners, who are daily resorting for refuge to this country from confiscation at home, would not be protected against the designs of artful men who could gain possession of it by any means."¹

In *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*² the ex-King of Spain had deposited certain securities in London and claimed them as his private property. The Banco de Vizcaya disputed the claim and maintained that the Republic of Spain had declared the King guilty of high treason and his private fortune as forfeited to the Spanish State. Lawrence, J., gave judgment in favour of the King for the reason that the enforcement of the contention of the Banco de Vizcaya would "directly or indirectly involve the execution of what are undoubtedly and admittedly penal laws of the Spanish Republic."³

It should be noted that in *Don Alfonso's case*² the private character of the property deposited in London by the ex-King was undisputed. If on the other hand the property situate in the English jurisdiction is public property of a foreign state, i.e. part of its public revenue, it cannot be claimed by an ex-Monarch of that state *qua* private person but only by the current Government which has been duly recognised by the Crown.⁴

(c) THE CONFISCATION OF PROPERTY CASES. In *Folliott v. Ogden* and *Don Alfonso's case*, confiscation of property by a foreign government was the outcome of a criminal prosecution and the penal nature of the forfeiture was beyond doubt. Greater difficulty arises in the cases where expropriation of property is not directed against an individual and is not the consequence of a criminal process, but is effected in a general way, e.g. where the foreign sovereign "considers (though we may think wrongly) that to vest individual property in the state as representing all the citizens is the best form of proprietary right."⁵ Such "nationalisation" of property entails considerable conflictual difficulties. Is the rule that the penal laws of a foreign country are not recognised in the English courts to be extended to confiscatory legislation of this character? Is such legislation, if omitting to make adequate provision for compensation, "contrary to essential principles of justice and morality" as understood in the

¹ (1790), 3 T.R. 734.

² [1935] 1 K.B. 140.

³ *Ibid.*, at p. 143.

⁴ *Haile Selassie v. Cable & Wireless Ltd.* (No. 2), [1939] 1 Ch. 182, 195.

⁵ *Per* Scrutton, L.J., in *Luther v. Sagor*, [1921] 3 K.B. 532, 539.

English courts? And further, if in England the Crown has conceded *de jure* or *de facto* recognition to a particular state, are the English courts at liberty to refuse to apply such confiscatory legislation of that state as being repugnant to English ideas of justice? We are here dangerously near a clash between two legal principles, namely between the rule that the English courts take no cognisance of foreign laws of a penal character or of a nature incompatible with English legal institutions, and the constitutional rule that the recognition of a foreign sovereign—with all that this implies—is reserved to the political authorities in the state.

The English courts have solved these difficulties by resorting to the fundamental principle of the conflict of laws that the jurisdiction of the sovereign is limited to his own territory. No sovereign is presumed to legislate *extra territorium*, and every enactment has to be construed strictly as having municipal effect only.¹ And if a foreign enactment purported to operate *extra territorium* there would be authority to argue that such an enactment is inoperative in this country.² The result of these considerations is that the effect of foreign laws nationalising property depends entirely on the local situation of the property alleged to be confiscated. If, at the time of the coming into force of the confiscatory decree of a foreign Government the property was situate within the boundaries of that state and if, in England, that Government is recognised as such by the Crown, then the English courts will accept the foreign laws without further examination. If, on the other hand, the property at that time was outside the jurisdiction of the foreign sovereign, the confiscatory legislation will, as a rule, not be admitted by the English courts. Sargant, L.J., said with respect to the legislation of Soviet Russia: ³ "Effective as such legislation may be within the limits of Russian territory it cannot determine the ownership of property locally situate in this country," and Hill, J., referred in this connection to the rule that "undoubtedly property passes according to the law of the place where it is situate."⁴ The result is, therefore, that foreign laws nationalising property are effective with regard to property within the jurisdiction of the foreign sovereign, and the English courts will not enquire into the propriety of that legislation if, in England,

¹ *Per curiam* in *Mount Albert Borough Council v. Australasian Temperance and Mutual Life Assurance Society, Ltd.*, [1937] 4 All E.R. 206, 216; Scott, L.J., in *Yorke v. British & Continental Steamship Co., Ltd.* (1945), 78 Ll.L.R. 181, 182.

² Lord Macnaghten in *Lecouturier v. Rey*, [1910] A.C. 262; Romer, J., in *Frankfurter v. W. L. Exner, Ltd.*, [1947] 1 Ch. 629.

³ *Sedgwick Collins & Co. v. Russia Insurance Co. of Petrograd*, [1926] 1 K.B. 1, 15.

⁴ *The Jupiter*, (No. 3), [1927] P. 122, 139.

the Crown has recognised the foreign sovereign. Property situate outside the jurisdiction of the foreign sovereign is, on principle, not affected by that legislation.¹

We come now to a consideration of the English cases concerned with these problems. In *Luther v. Sagor*² and *Princess Paley Olga v. Weisz*,³ the nationalised property was within the jurisdiction of the Soviet Union at the time of the nationalisation; in *Lecouturier v. Rey*,⁴ *Frankfurther v. W. L. Exner, Ltd.*,⁵ and *The Jupiter* (No. 3)⁶ it was outside the jurisdiction of the foreign sovereign.

In *Luther v. Sagor*² timber belonging to the plaintiffs and situate in a sawmill in Russia was seized in pursuance of a Soviet decree purporting to confiscate industrial and commercial property. Later, agents of the Soviet Republic sold a quantity of the seized stock in this country to the defendants. The plaintiffs sought a declaration that they had never ceased to be the owners of the timber, and claimed damages for conversion and detention of their property by the defendants. During the proceedings the Crown recognised the Soviet Government as a *de facto* government. The Court of Appeal gave judgment in favour of the defendants. The *ratio decidendi*—as far as it is of interest here—is contained in the following observations of Warrington, L.J.:⁷ "The question then is whether the Court has any power to question the validity of the proceedings under which the property in the goods has *prima facie* been transferred to the defendants. The letter of the Secretary of State is clearly conclusive as to the status of the Soviet Government—namely, that it is an independent sovereign government: see *Mighell v. The Sultan of Johore*, *per* Lord Esher, M.R.⁸ It is well settled that the validity of the acts of an independent sovereign government in respect to property and persons within its jurisdiction cannot be questioned in the courts of this country."

In *Princess Paley Olga v. Weisz*³ objects of art belonging to the plaintiff, who was the widow of the Grand Duke Paul of Russia, were seized by the Soviet authorities and sold and delivered to the defendant. The plaintiff claimed the sold goods from the defendant as her property. The Court of Appeal held that "the English Courts will not inquire into the validity of acts done by a recognised foreign government against its own subjects in respect of property situate in its own territory."⁹

It is noteworthy that in the latter case the Soviet decree pronounced the confiscation of all movable property of citizens who had fled from the country or were in hiding, as well as of objects of art forming part of the Museum Fund and being safeguarded by State means. If the decrees had pronounced a forfeiture of the property of

¹ *Frankfurther v. W. L. Exner, Ltd.*, [1947] 1 Ch. 629.

² *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.*, [1921] 3 K.B. 532.

³ [1929] 1 K.B. 718; see also the American case *Oetjen v. Central Leather Co.* (1917), 246 U.S. 297, 303.

⁴ [1927] 1 Ch. 629.

⁵ [1910] A.C. 262.

⁶ [1927] P. 122.

⁷ [1921] 3 K.B. 532, at p. 548.

⁸ [1894] 1 Q.B. 149, 158.

⁹ Headnote of *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718.

the members of the Romanoff family, it could have been argued that the seizure of the property was effected in pursuance of purely penal laws.¹ It should be added that the rules of the American conflict of laws are similar to the English rules on this point.

Among the cases where the confiscatory legislation was held to be inapplicable because the property in issue was at the time of the confiscation outside the foreign jurisdiction, the facts of *Lecouturier v. Rey*² are of particular interest.

The order of the Carthusian monks had its principal seat in the French Alps. At their monastery, a liqueur was distilled according to a secret process. The liqueur was sold all over the world as "Chartreuse" and had acquired fame under this name. In England the name was registered as a trade mark in the name of Abbé Rey, the plaintiff in the action. In 1901, the French legislature passed an Act declaring illegal all unlicensed religious associations. In pursuance of this legislation the monks were expelled and their property, including the distillery and the French trade marks, was confiscated. The French authorities had appointed a liquidator, M. Lecouturier, the defendant. The monks had set up a new distillery in Tarragona in Spain. There they began to manufacture their liqueur again according to the old secret process. The monks and the liquidator claimed to be entitled to the use of the English trade marks. Two issues arose, namely, whether the French legislation expropriating the property of the monks intended to include the English trade marks and, further, whether it was capable of so doing. The first one concerned the interpretation of the French statute, the second one the extra-territorial effect of the foreign legislation. The House of Lords came to the unanimous result that the French enactment did not contemplate a confiscation of such property of the Order as was outside France. It was not, therefore, necessary to decide the second issue. Lord Macnaghten, with the concurrence of Lords Atkinson and Collins and Lord Loreburn, L.C., added, however, *dicta* which made it clear that their Lordships entertained grave doubts whether a foreign enactment could attach property situate in England even if it so desired. Judgment was given for the monks.

In *Frankfurter v. W. L. Exner, Ltd.*,³ Romer, J., held that a Nazi decree confiscating the property of Austrian Jews and intended to have extra-territorial effect did not affect the title to property situate in England at the time when the decree was made, but was recognised by the English Courts in relation to property in Austria even though such property was subsequently transferred to England.

We have seen that the effect of foreign laws nationalising property depends on the local situation of the property in question. We come now to a further question,⁴ namely if the property is situate within the foreign jurisdiction and if the foreign laws nationalising the property

¹ See *Don Alfonso's case*, p. 55, *ante*.

² [1910] A.C. 262; the facts are taken from Lord Macnaghten's speech.

³ [1947] 1 Ch. 629.

⁴ See p. 55, *ante*.

are enacted by a sovereign duly recognised by the Crown, can the English courts still withhold recognition of those laws on the ground that they consider them inconsistent with "essential principles of justice and morality"?¹ It cannot be denied that the views formerly held in this country on the matter under discussion have been modified in view of the fact that in the United Kingdom several industries have been nationalised in the years following the Second World War though in every case provision has been made for the payment of compensation to the former owners. While, therefore, the problem can arise only in extreme cases,² it is, as a matter of principle, hard to believe that the English courts would enforce *any* foreign confiscatory law merely because the foreign sovereign, who enacted it, has been recognised by the Crown.³

(d) THE REQUISITION OF PROPERTY CASES. Apparently similar to the case of the confiscation of property is that of the requisition of property for public uses by the government of a country; e.g. the requisition of a ship for the duration of a war. There exist, however, considerable differences in fact and law between the two cases. Confiscation is a measure depriving the owner usually permanently of his property; requisition, on the other hand, is contemplated as a temporary transfer to the state of the property, possession or control of the movables or immovables in question. Further, the following distinction exists between the two cases. Whilst an expropriation of property without compensation—such as took place in Soviet Russia—is unknown to English internal law, the requisition of property in times of emergency is a well established prerogative of the King.⁴ Consequently, in the cases decided in the English courts in connection with foreign requisition laws, the problem has not been, as in some of the confiscation cases, the penal character of the foreign law but the territorial extent of the operation of the foreign requisition law.

In this direction, the English courts have developed a remarkable extension of the rule that the jurisdiction of a sovereign is limited to his territory—an extension which they would probably not admit with respect to confiscatory acts of a foreign state.⁵ In the contemplation

¹ *Per* Scrutton, L.J., in *Luther v. Sagor*, [1921] 1 K.B. 532, 537.

² *Per* Scrutton, L.J., *ibid.*, p. 559.

³ *Folliott v. Ogden* (1789), 1 H.Bl. 123; (1790), 3 T.R. 726. In *Luther v. Sagor*, Bankes and Scrutton, L.J.J., express—*obiter*—the view that the Soviet legislation on expropriation was not contrary to English rules of morality, [1921] 3 K.B. 532, 546, 558–9.

⁴ *The Salpêtre Case* (1607), 12 Co. Rep. 12; *A.G. v. De Keyser's Royal Hotel*, [1920] A.C. 588; *The Broadmayne*, [1916] P. 64.

⁵ *Lorentzen v. Lydden & Co. Ltd.* (1942), 58 T.L.R. 178, 180.

of the English courts, foreign requisition laws do not only apply to property situate within the jurisdiction of the state ordering the requisition¹ but, if so intended by that state, also to movable property ordinarily located within but at the relevant time situate outside the jurisdiction of that state provided that the foreign state is able to obtain, without breach of the peace, possession of or control over those movables outside its jurisdiction.² Thus in *Compañía Naviera v. S.S. Christina*³—a case which will be discussed in another connection⁴—the Spanish Government succeeded during the Spanish Civil War in obtaining possession of a ship registered in Spain but lying in a British port, the ship having been requisitioned at a time when she was outside the Spanish jurisdiction. The House of Lords unanimously recognised the application of the Spanish requisition decree to the ship. The position would, however, be different if the foreign government in pursuance of its requisition decree did not lawfully *obtain* possession of the movable but only *claimed* such possession. Here the general rule would apply that the jurisdiction of the sovereign is limited to his territory and the claim to possession would fail, as indicated, *obiter*, by Lord Wright in the *Christina* case⁵—

In the present case the fact of possession was proved. It is unnecessary here to consider whether the court would act conclusively on a bare assertion by the Government that the vessel is in its possession. I should hesitate as at present advised so to hold, but the respondents here have established the necessary facts by evidence.

B. Foreign rights repugnant to English social institutions. Foreign rights are further not recognised in the English courts if those rights are repugnant to English political, moral or judicial institutions.⁶ We shall first deal with foreign rights offending against English public policy in the technical sense, and then with the other cases where the "inevitable reservation" which is ubiquitous but sometimes in abeyance, has been invoked.

(a) FOREIGN RIGHTS CONTRARY TO ENGLISH PUBLIC POLICY. It is the practice of the English courts to deny legal validity to English contracts infringing public policy, and it is not to be expected that

¹ *The Porto Alexandre*, [1920] P. 30.

² *Compañía Naviera Vascongada v. S.S. Christina*, [1938] A.C. 485; *The Arantzazu Mendi*, [1939] A.C. 256; *Haile Selassie v. Cable & Wireless* (No. 1), [1938] Ch. 839.

³ [1938] A.C. 485.

⁴ In connection with the immunity of foreign governments from process in the English courts, see p. 409, *post*.

⁵ At p. 506. This dictum was followed by the Court of Appeal in *Haile Selassie v. Cable & Wireless Ltd.* (No. 1), [1938] 1 Ch. 839, 847.

⁶ Dicey, 5th ed., p. 25; see p. 50, *ante*.

they would accord more favourable treatment to contracts concluded abroad. "It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against the public policy of this country simply because it happens to have been made somewhere else."¹ This obvious inference cannot be affected by the argument that the contract does not infringe the "proper law" of the contract, i.e. the law which according to the intention of the parties is to govern the contract.

The reason why English courts refuse to enforce foreign contracts of this type is that the doctrine of public policy forms an intrinsic part of the *lex fori*. It is, therefore, immaterial that the contract is good according to its proper law which governs its substance. Westlake, in a passage which has been given judicial approval,² observes: "The plaintiff in such a case encounters that reservation of any stringent domestic policy, with which alone any maxims for giving effect to foreign law can be received."³ The American *Restatement* deals with the rule in the chapter on Procedure.⁴

Story⁵ thought that foreign contracts infringing domestic public policy were unenforceable as militating against "natural justice" or "Christian morality." It is not, however, a necessary element of such contracts that they should conflict with some moral principle common to the civilised world. A contract attempting to trade with the enemy in wartime⁶ is as much against public policy as a contract for immoral cohabitation.⁷ It is, therefore, more correct to base this rule entirely on considerations of a procedural character, and to hold that the courts of a country cannot be invoked to admit rights repugnant to the social institutions which it is their object to protect.

In accordance with these rules, the English courts have refused to enforce foreign contracts infringing the prohibition of trading with the enemy,⁸ contracts concluded under moral coercion,⁸ contracts which are in restraint of trade,⁹ or which tend to facilitate the obtaining of a divorce¹⁰ or are of a champertous nature,¹¹ though in all these cases the contracts were valid according to the foreign law governing

¹ *Per* Fry, J., in *Rousillon v. Rousillon* (1880), 14 Ch. 351, 369.

² By Lord Parker in *Dynamit A.G. v. Rio Tinto Co.*, [1918] A.C. 260, 302.

³ Westlake, 7th ed., para. 257, p. 307.

⁴ Para. 611.

⁵ Story, 7th ed., p. 292, s. 258.

⁶ *Dynamit A.G. v. Rio Tinto Co.*, [1918] A.C. 260, 302.

⁷ *Willyams v. Bullmore* (1863), 33 L.J. Ch. 461.

⁸ *Kaufmann v. Gerson*, [1904] A.C. 591; see the criticism of this case in Dicey, 5th ed., Appendix, Note 3, p. 882.

⁹ *Rousillon v. Rousillon* (1880), 14 Ch. 351.

¹⁰ *Hope v. Hope* (1857), 8 De G.M. & G. 731.

¹¹ *Grell v. Levy* (1864), 16 C.B. (N.S.) 73.

them. It will be observed that the courts would have arrived at the same result if the proper law of these contracts had been English law and if no conflictual question had been involved.

(b) OTHER CASES. We come now to the other cases where the ultimate reservation has been applied. These instances are to be found, in harmony with the general nature of the rule, scattered in different branches of the conflict of laws and it is sometimes not easy to discern the principle underlying them. Still, if we do not lose sight of it, we shall be provided with an intelligible explanation of several peculiarities of conflictual rules.

(i) *The law of torts.* Thus, in the law of torts, we shall meet the rule that no tort committed abroad gives rise to damages in the English courts unless it is also actionable according to English law.¹ This rule seems anomalous, for if a person has suffered a wrong in France and has acquired a properly vested claim for damages under French law, the English courts should, on principle, recognise such a claim. The qualification of the rule is easily appreciated if we remember the procedural character of the ultimate reservation. The English courts cannot very well give damages for a wrong committed abroad if they withhold damages for the same wrong if committed at home. English courts are willing to pay attention to foreign vested rights but they will not give them preferential treatment as compared with that conceded to English rights.²

(ii) *Foreign judgments.* A further illustration of this rule is provided by the attitude of the English courts towards foreign judgments. On principle, foreign judgments cannot be enforced in England directly but are considered as giving rise to a new obligation on the part of the defendant which may form a separate cause of action in an English court. The latter will, as a rule, consider the foreign judgment as conclusive if it is pronounced by a competent court abroad. The English Court will, however, decline to consider the foreign judgment as conclusive and will reopen the case, if a serious allegation is made that the foreign judgment has been obtained by fraud.³ The English courts will not permit themselves to be indirectly "compelled to become unwilling instruments in the perpetuation of a fraudulent

¹ *Machado v. Fontes*, [1897] 2 Q.B. 231; see p. 147, *post*.

² Similar considerations lie at the bottom of the rule in *Doe d. Birtwhistle v. Vardill* (1826), 5 B. & C. 438; (1835) 2 Cl. & F. 571, 582; (1840), 7 Cl. & F. 895, 940. According to this rule an heir to English freeholds must be born legitimate, and legitimisation by subsequent marriage of his parents was not sufficient (see p. 274, *post*).

³ *Vadala v. Lawes* (1890), 25 Q.B.D. 310; see p. 433, *post*.

act " ¹ and will refuse to recognise a foreign judgment based on facts inconsistent with English social notions, e.g. if it condemns the father of an illegitimate child to perpetual maintenance. ²

The attitude of American law on this question is interesting. In the external conflict, the rules of American law do not differ from those of English law. In the province of the inter-state conflict, it would be contrary to the *Full Faith and Credit Clause* of the American Constitution if a court of one state should withhold recognition of a judgment of a court of another state. ³ An American court is, therefore, constitutionally bound to treat the judgment of another American court as conclusive though it may infringe the public policy of its own jurisdiction. The *Restatement* gives the following explanation: "Differences in policy among (the states) are of minor nature, and for the most part relate to internal affairs."

(iii) *Discrimination for reasons of colour, race, etc.* The English courts have, further, refused to enforce foreign rights based on a discrimination in personal status. Slavery, civil death, prodigality, discrimination on grounds of colour, religion, race or class are unknown to the Common Law. Though such discrimination may form part of other legal systems, the English courts will not enforce rights based on them. With respect to slavery, this rule was laid down by Lord Mansfield in the *Case of the Negro Slave James Sommersett*. ⁴ With respect to discrimination on account of colour Lord Hannen observed in *Sottomayor v. De Barros* ⁵—

It is still the law in some of the United States that a marriage between a white person and a person of colour is void. In some states the amount of colour which would incapacitate is undetermined; in North Carolina all are prohibited who are descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person. . . . What have we to do, or to be more accurate, what have English tribunals to do with what may be thought in other countries on such a subject?

¹ Professor Gutteridge in *Cambridge Law Journal*, 1936, Vol. IV, p. 20.

² *In re Macartney, Macfarlane v. Macartney*, [1921] 1 Ch. 522; see pp. 429, 437, *post*.

³ The clause (Article IV, para. 1) runs as follows: "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State"; *Fauntleroy v. Lum*, 210, U.S. 230; *Roche v. MacDonald*, 275, U.S. 449; see p. 415, *post*.

⁴ (1771), 20 ST. T. 1; this decision was followed in *Forbes v. Cochrane* (1824), 2 B. & C. 448. In *Santos v. Illidge* (1860), 8 C.B. (N.S.) 861 the Court enforced a contract for the sale of slaves in Brazil where the keeping of slaves was lawful. Though the case was mainly concerned with the interpretation of a British statute, there is, it is believed, much force in the minority judgment of Wightman, J., and Pollock, C.B., that the statute invalidated the sale of slaves by British subjects everywhere.

⁵ [1879], 5 P.D. 94, 104.

This view was accepted by Sir Gorell Barnes in *Chetti v. Chetti*.¹

In this case, a Hindu, being the member of a Hindu caste, had married, at a registrar's office, during a temporary residence in London, an English woman who was domiciled in England. Later, the husband returned to India, and the wife presented a petition for judicial separation on the ground of desertion by the husband. The respondent's defence was that the marriage was void because by Hindu religion and law he was prevented from intermarrying except with a member of his caste. The court rejected the defence because "a man does not carry with him a disability of a personal character imposed by the law of his own country which would prevent him from entering into a marriage" with a lady in this country.²

¹ [1909] P. 67.

² [1909] P. 87.

CHAPTER IV

THE LAW OF DOMICIL *

I. DOMICIL—A PROBLEM OF CONNECTION

The solution of many problems pertaining to the conflict of laws can be effected by establishing the answer to the general question : Which legal system governs the personal relations of the person whose rights are in issue (usually called the *de cuius*) ? The status of a person,¹ the matrimonial relations of spouses, the relationship between parents and children, the succession to movables on death or bankruptcy, certain questions of taxation—these are matters which are governed by the personal law of the *de cuius*.

1. DOMICIL AND NATIONALITY.

The first question that arises is whether the law governing the personal relations is the law of the domicile of the *de cuius* or the law of his nationality ; the distinction between the political status of a person as based upon his nationality and the civil status as founded on his domicile, has been well expressed by Lord Westbury ²—

The law of England and of almost all civilised countries ascribes to each individual at his birth two distinct legal states or conditions ; one by virtue of which he becomes the subject of some particular country, binding him by the tie of national allegiance and which may be called his political status ; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries ; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status.

Under English and American law alike the law prevailing at the place of the domicile of the *de cuius* is regarded as the law governing his personal relations. Here we encounter a difference of signal importance between the Anglo-American conflict of laws and many

* For further reading : Dicey, 5th ed., App., note 6 ; Cheshire, 3rd ed., p. 197.

¹ See p. 272, *post*.

² In *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 457.

continental legal systems. The principle of domicile is one of the outstanding features of the English conflict of laws. That English law prefers it to the test of nationality is inevitable in view of the universal character of British nationality as the bond of personal allegiance connecting the King and his subjects.¹ The majority of the continental legal systems, in particular those of France, Italy and Germany, adhere to a different principle; they consider the personal relations of the *de cuius* as governed by the law of his nationality. Here again, the characteristics of the personal status in the legal system are the outcome of doctrinal considerations arising from the theory of the Neo-statutists. It should not be overlooked that, in this case as in many others, different legal theories or different rules of positive law are but the result of a different social environment.

The antagonism between the principles of domicile and of nationality has repeatedly provided serious impediments to the conclusion of international agreements extending to the sphere of the conflict of laws. However, these obstacles are not insurmountable. The First Inter-Scandinavian Convention of 6th February, 1931, has indicated a way worthy of imitation in similar circumstances. The Convention undertakes to unify certain conflictual rules relating to marriage and to the status of infancy prevailing in different Scandinavian countries; among those countries, Sweden and Finland have adopted the principle of nationality, whilst Denmark and Norway adhere to that of domicile.² The solution finally accepted by all the contracting parties is that in conflictual issues arising among themselves³ the law of domicile is to be the criterion of personal rights but that a minimum term of two years' residence is requisite for the acquisition of a new domicile in every one of the contracting countries.⁴

2. DOMICIL AS A MEANS OF CONNECTION.

The law of domicile is the core of the English system of conflict of laws. The leading principles of this branch of the law were developed relatively early. In particular, the statements of Lord Westbury in the two celebrated cases *Bell v. Kennedy*⁵ (1868) and *Udny v. Udny*⁶

¹ Pp. 23, 29, *ante*.

² The countries adhering to the principles of domicile and nationality respectively, are listed in M. Wolff, pp. 100-101.

³ In relation to countries which are not signatories to the Convention, every contracting party continues to apply the legal principle to which it previously adhered.

⁴ The value of Scandinavian law as a bridge between the systems of Common Law and Roman Law has been discussed by Professor Gutteridge with respect to the law of sale of goods; see 14 *B.Y.B.I.L.* (1933), 75, 87-8.

⁵ (1868), 1 L.R. Sc. & Div. 307.

⁶ (1869), 1 L.R. Sc. & Div. 441.

(1869) have cast the law of domicile into its present simple and logical form. The central position ascribed to the law of domicile by the writers on the conflict of laws may be gathered from the fact that the leading English digest on this subject was developed from a work on *The Law of Domicil as a Branch of the Law of England*.¹

The outstanding feature of the law of domicile is that the term "domicil" denotes "a legal inference,"² and not a statement of fact. "Domicil" in law has a strictly technical meaning and should not be confused with the colloquial use of the phrase as denoting "residence."³ We shall see that all the principles governing the law of domicile are based upon the fundamental idea that domicile is a technical legal conception. In particular, the twin maxims of the law of domicile that every person—even the vagabond—must have a domicile and that no person can have more than one domicile would be hardly understandable if the technical function of domicile were ignored.

The technical character of domicile has been explained by Lord Westbury in a famous passage—

Domicil, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country.⁴

In the United States Mr. Justice Holmes declared—

The very meaning of domicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law, may be determined.⁵

The American *Restatement*⁶ in its definition of domicile also refers to the technical character of this conception—

Domicil is the place with which a person has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by the law.

3. SUPERIORITY OF DOMICIL OVER NATIONALITY.

The technical nature of the conception of domicile accounts for its inherent superiority over the test of nationality. Nationality is a political fact and a legal system adopting this criterion subjects itself to the contingencies attendant upon the facts concerned.⁷ The

¹ Dicey, 5th ed., p. xv.

² *Per* Lord Macmillan in *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 597.

³ Dicey, 5th ed., pp. 72, 76.

⁴ *Bell v. Kennedy* (1868), L.R., 1 Sc. App. 307, 320.

⁵ *Williamson v. Osenton*, 232 U.S. 625.

⁶ Para. 9 at p. 17.
⁷ I differ in this respect from Pillet, *Traité pratique de droit international privé*, 1923, No. 140, at p. 286. M. Wolff, pp. 102-104, arrives at the same conclusion.

test of nationality breaks down in the case of double nationality or statelessness, or when several legal units form the components of one political unit. No *lacunae* of this kind can arise in a system adopting the test of domicile because here the law, sole and supreme, connects the person with a definite legal system, if necessary by means of a legal fiction.

II. DEFINITION OF DOMICIL

The definition of domicile has been made the subject of much discussion.¹ It has been said by high authority that "it is impossible to lay down an absolute definition of domicile"² and that "it is extremely difficult for anyone to give a simple definition to that word."³ However, if domicile is "an idea of law" it must be capable of legal analysis, though, if the essential elements of this conception have been ascertained, the further question whether such definition has been satisfied in a particular case may involve considerable difficulties. Lord Halsbury, L.C., said in *Winans v. A.G.*⁴ that so far as it is a question of law it is simple enough to state, but when the law has been stated a difficult and complex question of fact arises which it is almost always very hard to solve.

In the same case, the Lord Chancellor gave the following classical definition of domicile—

Although many varieties of expression have been used, I believe the idea of domicile may be quite adequately expressed by the phrase—was the place intended to be the permanent home?

A similar definition was adopted by Lord Cranworth in an earlier case⁵—

By domicile we mean . . . the permanent home; and if you do not understand your permanent home, I am afraid no illustration drawn from foreign writers or foreign languages will very much help you to it.

However, the explanation that the domicile of a person is the place of his permanent home, does not carry us very far, for we are now confronted with the further question: What is the permanent home of a person? Yet, general *formulae* such as the reference to the permanent home, or the proper law of the contract which we shall encounter later, are as valuable in the province of the conflict of laws

¹ See Dicey, 5th ed., at p. 887 on "Definition of Domicil."

² *Per* Sir George Jessel in *Doucet v. Geoghegan* (1878), 9 Ch. D. 441, 456.

³ *Per* Bramwell, B., in *A.G. v. Rowe* (1862), 31 L.J. (N.S.) Exch. 314, 319; further Wood, V.C., in *Forbes v. Forbes* (1854), 23 L.J. (N.S.) Ch. 724, 726; Kindersley, V.C., in *Cockrell v. Cockrell* (1856), 25 L.J. (N.S.) Ch. 730, 731.

⁴ [1904] A.C. 288.

⁵ *Whicker v. Hume* (1858), 7 H.L. 124, 160.

as the conception of duty in the law of negligence or the test of reasonableness in the cases dealing with restraint of trade. They maintain the elasticity of English case law and keep it in touch with popular imagination.

The permanent home of a person is

- (1) either the place "in which his habitation is fixed without any permanent intention of removing therefrom" ¹ (*domicil of choice*),
- (2) or the place "which (whether it be in fact his home or not) is determined to be so by a rule of English law" ² (*domicil by operation of law*).

Later we shall examine the different kinds of domicil in detail. Here it will be sufficient to survey them. The *domicil of choice* is acquired by the concurrence of two incidents, namely "the physical fact of residence" (*factum*) and the "mental fact of intention" (*animus*).³ The acquisition of a domicil of choice occurs if a person departs from the country of his birth "for good" and founds his homestead in a foreign country. We shall see that the decision whether a person has acquired a domicil of choice or merely has taken residence in a foreign country is one of the most difficult questions of case connection.⁴ We shall see that to answer this question it will be necessary to analyse various facts related to the conduct as well as to the intentions and ambitions of the *de cuius*.

Domicil by operation of law affords a good illustration of the technical character of the conception of domicil, and has to be subdivided into

- the domicil of origin, and
- the domicil of dependent persons.

The domicil of origin is the domicil which the law attributes to every person at his birth. In the case of a legitimate child, this is the domicil of the father at the time of the child's birth; in the case of an illegitimate or posthumous child, it is the domicil of the mother at the time of the child's birth; in the case of a foundling, it is the place where the child was found. It is obvious that the great majority of persons never abandon their domicil of origin. They may go abroad for purposes of business, health or pleasure, but they are not actuated by the desire to make the foreign place visited their permanent home. The peasant who never leaves his native village and the explorer

¹ Story, s. 43.

² Dicey, Rule I, at p. 65 (5th ed.).

³ *Per* Lord Macmillan in *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588, 597; see also Scrutton, L.J., in *Casdaghi v. Casdaghi*, [1918] P. 89, 109.

⁴ On case connection, see p. 46, *ante*.

who pays only sporadic visits to his home country are alike in that they do not lose their domicile of origin.

With respect to *the domicile of dependent persons*, it should be observed that the criterion of dependency relates here only to the legal capacity of a person to change his domicile at his own will and discretion. This term does not imply an incapacity in any other direction. Persons who are "dependent" in this sense are married women who share the domicile of their husbands; children who share that of their parents or guardians; and persons of unsound mind who are subject to special rules. "Independent" persons in this sense are all male adults and all unmarried female adults unless they are persons of unsound mind; these persons have never a dependent domicile but they either retain their domicile of origin or they may acquire a domicile of choice.

III. THE PRINCIPLES OF THE LAW OF DOMICIL

We have based our discourse on the law of domicile on the assertion that the importance of domicile in English law arises from the technical character of domicile as a means of connection between a person and some legal system. From these premises spring the twin maxims of the English law of domicile, namely that

every person must have a domicile and that
no person can have more than one domicile.

It is evident that without these maxims the law of domicile would not be in a position to fulfil its function of connection.

1. EVERY PERSON MUST HAVE A DOMICIL.

The maxim that every person must have a domicile is justified in the following way. The law attributes a domicile of origin to every person at his birth. Thus from the earliest moment in the life of a person the ends of the law are secured and no person can avoid having a domicile. Subsequently, the domicile of origin of the *de cuius* may be changed: the person on whom his domicile depends may transfer his *lares* into another country, or, if the *de cuius* is *sui juris*, he may acquire a domicile of choice. In any case, the law of the domicile of origin of the *de cuius* does not cease to apply until a complete change of domicile has been effected.

Moreover, the law has to safeguard its maxim against another contingency which can arise in the case of an inchoate attempt to change the domicile. A person may abandon his domicile without the

intention of acquiring another one or with the intention so to do but without being able to realise his desire.

If, for instance, Mr. A who was born in Holland but was domiciled in the United States for many decades, has resolved to spend the rest of his life in the old world without deciding definitely which country he is going to elect as his permanent home, and if having left the United States he dies whilst travelling on the Continent in search of a new home, the question may arise what his domicile was at the time of his death, i.e. during the stage of indecision.

Mr. A has abandoned his American domicile of choice because he left it *animo* and *facto*. As he died *in itinere*, i.e. during an inchoate attempt to change his domicile, he has not acquired another domicile of choice because at no time has there been such coincidence between residence and intention to reside permanently as in law gives a place the quality of domicile. Since the law cannot admit that a person, even for a short time, is without domicile, the law has to devise a fiction for the purpose of attaching a domicile to the *de cuius*. Here the English and American doctrines differ, and this difference has been described as of unusual importance.¹ The natural solution would seem to be that the previous domicile continues to exist in law until a new one has been properly acquired. This *doctrine of continuance of domicile* is accepted in the American courts.² The English rule, on the other hand, is since 1801³ in favour of the *doctrine of revival of the domicile of origin*. According to the English rule, a domicile of origin can never be lost but it may be "in abeyance,"⁴ for instance during the time when the *de cuius* possesses a domicile of choice. A dormant domicile of origin revives after the domicile of choice has been abandoned. In other words, the gap between the former abandoned domicile and the domicile not yet acquired is closed in the American system by the law of the former domicile, in the English system by the law of the domicile of origin. Thus, in our example above, Mr. A would according to English law be considered as domiciled in Holland, but the American courts would hold that he continued to be domiciled in the United States. It follows that English law draws a fundamental distinction between the domicile of origin and that of choice. The former can never be lost; it can only fall in abeyance, the latter may be abandoned *animo* and *facto*. American law, on the

¹ Professor Keith in I, *Toronto Law Journal* (1936), p. 238.

² *In re Jones's Estates* 192, 1a, 78; 182 N.W. 227 (1921); 16 A.L.R. 1286; *Desmare v. United States*, 93 U.S. 605.

³ *Per* Lord Stowell in *The Indian Chief* (1800), 3 C.Rob. 12, 20.

⁴ *Per* Lord Westbury in *Udny v. Udny* (1869), 1 Sc. & Div. 458; Wynn-Parry, J., in *In re Evans, National Provincial Bank, Ltd. v. Evans*, [1947] 1 Ch. 695.

other hand, does not share "the British loyalty to one's place of birth,"¹ it admits the abandonment of the domicile of origin in the same way as that of the domicile of choice.

The doctrine of the revival of the domicile of origin was laid down in the celebrated case of *Udny v. Udny*.²

Colonel Udny had a Scottish domicile of origin. When *sui juris*, he acquired a domicile of choice in London where he lived for 32 years. Then he went to France where he remained for 9 years. During this time Udny formed a connection with a lady, and a son was born in 1853. Subsequently, Udny went with the lady to Scotland, married her and settled down there.

The issue was whether Udny's son was illegitimate or legitimated by the subsequent marriage of his parents in Scotland. The rule of law at that time was that a marriage entailed the legitimation of the pre-born issue only if the institution of the *legitimatio per subsequens matrimonium* was recognised by the law of the domicile of the father both at the time of the birth of the offspring and at the time of the celebration of the marriage. Scottish law, as the law of Colonel Udny's domicile at the time of his marriage, admitted legitimation by subsequent marriage; in so far, the case was free from complexity. The sole—and intricate—issue was: what was Colonel Udny's domicile at the time of the birth of the son in 1853? French law was out of question because it was clear that Udny had merely resided in France. The choice lay between his Scottish domicile of origin and his English domicile of choice. In the first case, the son would have been legitimated, in the second, he would have been illegitimate and excluded from inheritance because English law did not recognise a legitimation by subsequent marriage before the Legitimacy Act, 1926. The House of Lords held that Colonel Udny when embarking for France had abandoned his English domicile of choice because he had left England *animo et facto*, and that Udny's Scottish domicile of origin had revived, after having been in abeyance for 32 years. The result was, therefore, that Colonel Udny's son was legitimated.

2. NO PERSON CAN HAVE MORE THAN ONE DOMICIL.

The second maxim, i.e. that no person can have two domicils at the same time,³ is the necessary corollary to the first proposition. The following example given in the American *Restatement* shows that the law does not hesitate to carry the principle of one domicile to extremes. It may happen that a dwelling house is built on the boundary line between two legal units. According to the *Restatement*, the domicile of the inhabitants is in that country in which the preponderant part of the house is situate, and if both parts are equally important, in the country where the main entrance is located.⁴

¹ 1 Beale, p. 184.

² (1869), 1 L.R. Sc. & Div. 441, 458; see also *In re Evans, National Provincial Bank, Ltd. v. Evans*, [1947] 1 Ch. 695.

³ The domicile of origin, when in abeyance, cannot be regarded as an operative domicile.

⁴ American *Restatement*, para. 25, p. 49. Lord Coke had suggested that the domicile is in the country in which the bed was situate: see *Abington v. North Bridgewater* (1839), 23 Pick 170, 179 (Mass.), 1 Beale, 193.

Some foreign legal systems like ancient Roman¹ and modern German² law see no objection to admitting more than one domicile at the same time.³ This difference from English law has its reason not in a careless confusion of domicile and residence, but in the different function attributed to the conception of domicile in the relative system of jurisprudence. A modern legal system that considers the criterion of nationality as the means of connecting a person with some legal system has no reason to insist on the singularity of domicile with the same firmness as English law.

3. THE *LEX FORI* DEFINES DOMICIL.

In accordance with the rules of classification which have been discussed in the preceding chapter,⁴ it is left to the *lex fori* to define the conception of domicile. Consequently, in cases before the English courts, the domicile of a person has to be ascertained on the basis of English law.⁵

4. SUMMARY OF THE PRINCIPLES OF THE LAW OF DOMICIL.

We are now in a position to summarise the principles of the English law of domicile in their logical sequence—

(1) **Domicil is a technical conception of law designed to connect the personal relations of the *de cuius* with a territorial system of law.**

(2) **The domicile of a person is the place of his permanent home.**

The permanent home—

A. of an independent person is

(a) his domicile of origin or

(b) the place where he has established his residence without any permanent intention of removing therefrom (domicil of choice);

B. of a dependent person is

the domicile of the person on whom he depends with respect to the acquisition and loss of domicile.

(3) **Every person must have a domicile.**

(4) **No person can have two domicils at the same time.**

(5) **The domicile of origin can never be lost but it may be in abeyance.**

(6) **In the English Courts domicile is ascertained according to English law.**

¹ Savigny *System*, (transl. Guthrie), p. 62; p. 85 fn. m.

² German Civil Code, para. 7.

³ French law has accepted the doctrine of the "unité de domicile" (Code Civil, Art. 102).

⁴ Above, p. 34.

⁵ Lindley, M.R., in *In re Martin, Loustalan v. Loustalan*, [1900] P. 211, 231; and Russell, J., in *Re Annesley*, [1926] 1 Ch. 692, 703.

IV. THE DIFFERENT KINDS OF DOMICIL

Proceeding now to a detailed investigation of the different kinds of domicile, we shall first consider the domicile of origin, then the domicile of choice and finally the domicile of dependent persons.

1. DOMICIL OF ORIGIN.

The prominence of the domicile of origin is the most remarkable feature of the English law on this subject. It is founded on the experience that the ties connecting a person with his native country are of a lasting character. Lord Stowell expressed this view in *La Virginie* ¹—

It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicile in the case of a native subject than to impress the national character on one who is originally of another country.

From the point of view of doctrine, the English insistence on the prevalence of the domicile of origin is directly opposed to Savigny's view of domicile as the law to which a party has voluntarily submitted.

The prominence of the domicile of origin can be observed in three directions—

- first, in the doctrine of abeyance and revival of the domicile of origin in case of change of domicile ;
- secondly, in the particular burden of proof necessary to displace the domicile of origin ; and
- thirdly, in the application of the law of domicile of origin where "*renvoi*" breaks down.

Whilst the first of these aspects has been dealt with earlier ² and the third will be considered later,³ the second will be treated here.

In general, the law presumes that a person is domiciled in the country where he is resident.⁴ A further presumption exists in favour of the continuance of an established domicile. The consequence is that "where a domicile has been constituted the proof of the change of domicile is thrown upon the party who disproves it."⁵ However, these presumptions are overshadowed by the strong leaning of the English courts in favour of the domicile of origin. The onus of disproving a

¹ (1804) 5 Rob. Adm. 99.

² P. 71, *ante*.

³ P. 95, *post*.

⁴ This *prima facie* inference does not exist in those cases where the residence in a foreign country is obviously not accompanied by the intention to remain there indefinitely, as in the case of ambassadors, missionaries, persons in military or naval service and students (see Dicey, 5th ed., p. 123).

⁵ *Per* Lord Brougham in *Munro v. Munro* (1840), 7 Cl. & F. 842, 891, see also *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. 285, 323, Lord Lindley in *Winans v. A.G.*, [1904] A.C. 287, 299.

domicil of origin is much heavier than that of disproving the abandonment of a domicil of choice.¹ Lord Macnaghten observed in *Winans v. A. G.*²—

Domicil of origin . . . differs from domicil of choice mainly in this—that its character is more enduring, its hold stronger and less easily shaken off.

It is noteworthy that American law does not attribute such prominence to the domicil of origin. There, “the immigrant who identifies himself with his new country, or the Easterner who goes West and identifies himself with his new part of the country, is a common figure.”³

2. DOMICIL OF CHOICE.

A. General observations on acquisition, abandonment and retention of domicil. An important element in the domicil of choice is the will of the person making the choice. The questions on which we have to concentrate our attention here are the *acquisition* and the *abandonment* of the domicil of choice.

Both acts require, as has already been mentioned, the concurrence of *animus* and *factum*. In the case of the acquisition of a domicil of choice, the physical fact of residence must be accompanied by the mental fact of intention to make the place one's permanent home.⁴ In the case of abandonment, the physical fact of departing must accompany the mental fact of intending to discontinue one's permanent home.⁵ On the other hand, once a domicil of choice has been established it can be retained without concurrence of residence and intention. A person retains the domicil of choice if he has ceased to reside in the country where that domicil is situate but intends to return to that country. It does not matter whether he stays away for a long or short time. Thus, *In re Evans*; *National Provincial Bank, Ltd. v. Evans*⁶

E., whose domicil of origin was England, had acquired a domicil of choice in Brussels. When the Germans invaded Belgium in 1940, he went to England. He frequently expressed his intention to return to Brussels upon the successful conclusion of the War, though on occasions he appeared to vacillate and talked of his intention of going to Australia. E. died in England during the second World War, and, incidental to a dispute about his will, the question arose where he was domiciled at the time of his death. It was argued that he had abandoned his Belgian domicil of

¹ *Winans v. A.G.*, [1904] A.C. 290; *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588; *Wahl v. A.G.* (1932), 147 L.T. 382; *In re Martin*, [1900] P. 211; *Re Liddell Grainger's Will Trusts* (1936), 53 T.L.R. 12.

² [1904] A.C. 290.

³ Beale, 184-5.

⁴ Lord Macmillan in *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 597.

⁵ *In the Goods of Raffeneil* (1863), 3 Sev. & Tr. 49.

⁶ [1947] 1 Ch. 695.

choice and that his English domicil of origin, which had been in abeyance, was revived.

Wynn-Parry, J., rejected this argument and held that E. had retained his Belgian domicil of choice because the evidence did not establish his unequivocal intention of leaving Belgium.

The domicil of choice is, further, retained—and not abandoned—if a person desiring to transfer his permanent home to another country has not left the territory in which his existing domicil of choice is situate.

Thus, *In the Goods of Raffeneil*,¹ Mrs. Raffeneil, the English born widow of a French naval officer, had left her French home with the intention of resuming her English domicil of birth. She embarked with her children and baggage in Calais for England. But before leaving the harbour she was taken so ill that she had to disembark. She stayed several months in Calais always hoping to recover sufficiently to cross to England. However, she died without having left Calais.

Sir C. Cresswell held that the French domicil of choice was never abandoned as the deceased had never left the territory of France.

We may arrange these conclusions as follows—

Requirements of the Domicil of Choice.

<i>Acquisition :</i>	residence	<i>and</i>	intention.
<i>Retention :</i>	residence	<i>or</i>	intention.
<i>Abandonment :</i>	residence	<i>and</i>	intention.

As to the criteria of residence and intention it is easy to discover whether a person satisfies the physical criterion of residence. Residence is established if the *de cuius* is present in the territorial unit in question. The mental element of intention is much more important inasmuch as, from the point of view of logic, it would not be wrong to say that residence is merely an incident—though an indispensable one—in ascertaining this intention because the constitution of a domicil of choice is the outcome of a voluntary resolution of the *de cuius*. To ascertain this intention is an extremely difficult task—as perplexing as the exploration of such inner facts as “intention” or “malice” in the realm of tort or crime. The *de cuius* must be actuated by the *intention to reside for an indefinite period*; no other intention would be compatible with the idea of a permanent home. Intention should, further, not be confounded with motive. A person may have a preference for a locality for reasons of business,² of economy, of family, marriage, or other ties,³ or for pleasure, pastime or even sheer inertia making him disinclined to change the present place of abode. Such a person may, however, never intend to choose the favoured place as

¹ *In the Goods of Raffeneil* (1863), 3 Sw. & Tr. 49.

² *Jopp v. Wood* (1865), 4 De G. J. & S. 616; *Sim v. Sim*, [1944] P. 87, 90.

³ *Fasbender v. A.G.*, [1922] 1 Ch. 232; [1922] 2 Ch. 580 (CA).

his permanent home. On the other hand, motive is one—and not the least—of the elements that have to be considered when determining the intention of a *de cuius* to make a place his permanent home.

B. Ascertainment of the intention of the *de cuius* to acquire or abandon a domicile. It would be unprofitable to attempt to lay down hard and fast rules for ascertaining this intention. The cases which we shall review forthwith will illustrate the lines on which the courts proceed. We shall see that the courts examine with the utmost care all factual incidents. “There is no act, no circumstance in a man’s life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change domicile.”¹ “In *Winans’ case*,² the tastes, habits, conduct, actions, health, hopes and projects of Mr. Winans deceased were all considered as keys to his intention to make a home in England.”³ However, we have already mentioned that the courts lean in favour of the domicile of origin and are not very ready to infer the intention of “*exuere patriam*”⁴ on the part of the *de cuius*. It should be added that change in political status is of no more than incidental nature;⁵ that length of time is an important but not conclusive feature;⁶ that the declaration by a party of his intention must be fortified by facts;⁷ and that no compulsion should despoil the volition of choice on the part of the *de cuius*.⁸

The leaning of the courts against the assumption that the *de cuius* had intended to abandon his domicile of origin can be observed in *Ramsay v. Liverpool Royal Infirmary*⁹ and in *Winans’ case*.¹⁰

In *Ramsay v. Liverpool Royal Infirmary*,⁹ the testator had made a holograph will which was good according to Scottish, but invalid according

¹ *Per* Kindersley, V.C., in *Drevon v. Drevon* (1864), 34 L.J. (N.S.) Ch. 129.

² *Winans v. A.G.*, [1904] A.C. 287.

³ *Per* Lord Atkinson in *Casdagli v. Casdagli*, [1919] A.C. 145, 178; see also Turner, L.J., in *Hoskins v. Matthews* (1855), 8 De G.M. & G. 13, 16.

⁴ *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307; *Winans v. A.G.*, [1904] A.C. 287; *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588; *Wahl v. A.G.* (1932), 147 L.T.R. 382.

⁵ *Wahl v. A.G.* (1932), 147 L.T.R. 382; on the possibility of deportation *Boldrini v. Boldrini*, [1932] P. 9; *Cruh v. Cruh* (1945), 62 T.L.R. 16; *Bradfield v. Swanton*, [1931] I.R. 446; *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441.

⁶ Lord Macnaghten in *Winans v. A.G.*, [1904] A.C. 287, 297; *Ramsay v. Liverpool Infirmary*, [1930] A.C. 588.

⁷ *Wahl v. A.G.* (1932), 147 L.T.R. 382; *Re Liddell-Grainger’s Will Trusts* (1936), 53 T.L.R. 12.

⁸ This is illustrated by the so-called “health” cases: *Jopp v. Wood* (1865), 4 De G.J. & S. 616; *Hoskins v. Matthews* (1855), 8 De G.M. & G. 13; the “fugitive” cases: *In re Martin*, [1900] P. 211, and similar cases: see p. 80, *post*.

⁹ [1930] A.C. 588.

¹⁰ *Winans v. A.G.*, [1904] A.C. 287; see also the cases mentioned in footnote 4, *supra*.

to English law. The testator was born in Glasgow, and had a Scottish domicil of origin. He lived in Scotland until he was 46 years of age. Then he moved to Liverpool and spent the last 36 years of his life there. The cause of the move to Liverpool was apparently that his brother and sisters lived there, but he continued to reside in Liverpool after the death of his relatives. The testator never set foot on his native soil again.

In the holograph will made three months before his death, the testator bequeathed moneys to four infirmaries, three at Glasgow and one at Liverpool, and directed that the moneys should be given anonymously from a "Glasgow man." Other relevant facts were that "he told people that he was proud to be a Glasgow man; and received a Glasgow weekly newspaper." He was buried in Liverpool in ground for which his brother had paid.

The House of Lords held that the defender had failed to disprove the testator's domicil of origin. The facts did not reveal the testator's intention to make Liverpool his permanent home. He moved to Liverpool merely because he desired to join his family. He continued his residence after the death of his relatives as the result of his lack of initiative and "the disinclination of a man sixty-nine years of age to change his mode of life." His true state of mind was revealed by the fact that three months before his death he called himself proudly a Glasgow man. His residence in Liverpool for the last 36 years was in itself not enough, it was not accompanied by the intention to settle in England as his permanent home. Consequently, the domicil of origin was not displaced and the holograph will was good.

In *Winans v. A.G.*¹ the question was whether the Crown was entitled to legacy duty on certain bequests under the will of Mr. Winans. If the testator at the time of his death was domiciled in England, legacy duty was payable on these bequests, but not otherwise. The testator had an American domicil of origin, and he was an American subject. He was first employed in his father's business in Baltimore. When 27, Mr. Winans went on business to Russia. There he married a lady from Guernsey. When 36, he showed signs of consumption and on medical advice took up residence in Brighton during the winter. The summers he continued to spend in Russia. When 60, he ceased to visit Russia and lived mostly in Brighton. He died when 74. He was a man of great wealth. He never bought an estate in England, but lived always in furnished houses.

Lord Macnaghten's speech from which these facts are taken may be regarded as a model for the painstaking examination² necessary in these cases. After having considered these facts, Lord Macnaghten analysed the mental side, the "object of life" of the testator. "Besides the care of his health, there were two other objects which engrossed his thoughts. The first was the construction of spindle shaped vessels, commonly called cigar ships. Mr. Winans declared his confident expectation that a fleet of spindle shaped vessels . . . would restore to America the carrying trade which had fallen into the hands of England and other foreign nations, secure to America the command of the sea, and make it impossible for Great Britain to maintain war against the United States. The second scheme was devoted to the purchase of a waterfront in Balti-

¹ *Winans v. A.G.*, [1904] A.C. 287.

² Another illustration of the same method of approach is *Turner, L.J.'s* survey in *Hoskins v. Matthews* (1855), 8 De G.M. & G. 13.

more. It should be used as a base for his cigar ships, for wharves and docks, and for the building of houses. There Mr. Winans intended to build a big house for himself and control the whole undertaking." Lord Macnaghten summed up these schemes as follows: "One of them was anti-English and the other wholly American."

Lord Macnaghten, then, made the following observations with respect to the time incident: "Length of time is, of course, a very important element in questions of domicil. An unconscious change may come over a man's mind. If the man goes about and mixes in society that is not an improbable result. But in the case of a person like Mr. Winans, who kept himself to himself and had little or no intercourse with his fellow men, it seems to me that at the end of any space of time, however long, his mind would probably be in the same state it was at the beginning."

The House of Lords (Lord Lindley dissenting) held that the Crown had not disproved Mr. Winans' American domicil of origin.

Change of nationality and the possibility of deportation are not conclusive but merely incidental in the determination of domicil. The first point is illustrated by *Wahl v. A.G.*,¹ the second one by *Cruh v. Cruh*.²

In *Wahl v. A.G.*¹ the issue was whether death duty was payable in respect of the deceased's property situate abroad. Such duty was payable if the deceased was domiciled in England at the time of his death.

The deceased was born in Germany of German parents and thus had a German domicil of origin. When 27, he came to England and lived at various places in London; apparently he often went to Germany. When 32, he applied for and obtained naturalisation as a British subject. In a declaration attached to the application, he declared he had for 5 years resided in the United Kingdom and that he intended to reside here permanently. Immediately after his naturalisation, he returned to Germany but subsequently he stayed in England, except for frequent visits of considerable duration to Germany. His father had left him large business interests in Germany, and his visits to Germany were mainly devoted to the management of this business. He also kept the old family house in Germany and resided there when in Germany. The incidents pointing to the English domicil were, in addition to his declaration in the application for naturalisation, that when 41 he had taken a long lease of a house in Hampstead where he lived when in England and where he died in 1915. His two sons by his first wife entered the public service of England, one joining the army, the other the Indian Civil Service. His second wife was of English birth, though educated in Germany, and she lived continuously in the house at Hampstead.

The House of Lords (Lord Macmillan dissenting) held that the deceased had retained his German domicil of birth. Lord Atkin when explaining that no conclusive weight could be attached to the fact of naturalisation said: "It is important to remember that naturalisation is one thing, change of domicil is another, and that it is not the law either that a change of domicil is a condition of naturalisation or that naturalisation involves necessarily a change of domicil."

¹ (1932), 147 L.T.R. 382.

² (1945), 62 T.L.R. 16 (in this case a deportation order was already made, but its execution was, for the time being, impracticable); further, *Boldrini v. Boldrini*, [1932] P. 9.

A declaration of the intention to be domiciled at a certain place deserves careful attention but is not conclusive.¹ It must be supported by the surrounding facts. Lord Buckmaster said in *Ross v. Ross* ²—

Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which, they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression.

In particular, declarations contained in legal documents or printed forms have to be fortified by the facts of the case because they are sometimes regarded by the parties signing them as mere formalities. We have already mentioned that in *Wahl v. A.G.*³ a declaration of domicile in naturalisation papers was not considered as conclusive. A similar decision was arrived at in *In re Liddell-Grainger's Will Trusts*⁴ with respect to a declaration of domicile in a will and in *In re Martin*⁵ with respect to a declaration expressed in a mortgage deed.

Further, the intention to acquire or abandon a domicile of choice must not be vitiated by compulsion. Here again a scrupulous examination of all factual incidents is necessary. It is evident that physical force excludes the discretion to select a permanent home. Thus, a prisoner, whether a prisoner of war or a convict, is, in general, not domiciled at the place of detention even if he is confined for life, but will retain his previous domicile.

In *Re the Late Emperor Napoleon Bonaparte*⁶ the Foreign Secretary asked for a decree that the original will of the late Emperor, who had died a prisoner of war in St. Helena in 1821, should be delivered to him for the purpose of making it over to the French government upon a notarial copy thereof being left in the Registry of the Court. This application could only be granted if Napoleon at the time of his death was still domiciled in France. Sir John Dodson granted the application saying that "Napoleon Bonaparte, though a prisoner at St. Helena, did not from that circumstance lose his French domicile."

Greater difficulty arises in the cases where a person chooses a residence for considerations of health, or as a fugitive from justice, or from a revolution. In the *prisoner* cases physical force negatives free will, while in the *health* and *fugitive* cases mental pressure may so affect the *de cuius* as to exclude his freedom of decision. Such mental influences cannot be disregarded, for the choice of a domicile is, as we have seen, an inner fact, an act of voluntary resolution. The

¹ *In re Annesley* [1926] 1 Ch. 692, 701.

² [1930] A.C. 1, 6.

³ (1932), 147 L.T.R. 382.

⁴ (1936), 53 T.L.R. 12.

⁵ [1900] P. 215.

⁶ (1853), 2 Rob. Ecc. 606, at p. 91.

problem involved in the *health* and *fugitive* cases is whether the moral pressure which was brought to bear on the *de cuius* was so strong as to deprive him of his freedom of decision or whether it was merely a motive—though an important one—causing him to exercise his choice in a particular direction.

*Hoskins v. Matthews*¹ may serve as an illustration of the health cases.

In this case, the issue was to determine the domicile of the testator Mr. Matthews. The testator had an English domicile of origin. In his later years he developed a disease of the spine and was advised that the climate in southern countries would be more suitable to his health than the English climate. Thereupon he took up residence in Florence. He purchased a villa and some land and lived there almost continuously for the last 11 years of his life. In his correspondence, the testator showed a determined attachment to England. Almost all his sons were educated in this country. His housekeeper deposed in her examination that the testator's object in coming to Florence and residing there was to benefit his health; . . . "He frequently regretted having purchased the villa. He often said there was no country like one's own to live in."

Turner, L.J.,² stated the principle of law with respect to moral compulsion as follows: "That there may be cases in which even a permanent residence in a foreign country, occasioned by the state of health, may not operate as change of domicile may well be admitted. Such was the case put by Lord Campbell in *Johnson v. Beattie*.³ But such cases must not be confused with others in which the foreign residence may be determined by the preference of climate or the hope or the opinion that the air or the habits of another country may be better suited to the health or constitution. In the one case, the foreign abode is determined by necessity; in the other it is decided by choice."

The Court held that the testator "was not driven to settle in Italy by cogent necessity" and that Florence was his domicile of choice.

With respect to the *fugitive* cases, we shall first consider the position of a fugitive from justice. He flees his country because he wants to escape punishment. At first sight, this appears to be a clear case of moral compulsion. However, the fugitive may intend to make the country of refuge his permanent home. Though originally desirous of returning to his own country, he may acquiesce in the facts and finally become so absorbed in his new community that he would not return to his country even if he were at liberty so to do. On principle the same dilemma between necessity and attachment exists here that we have met in the health cases though, in the case of the fugitive, the difficulty will often arise subsequent to his taking up residence abroad.

¹ (1855), 8 De G.M. & G. 13.

² *Ibid.*, at p. 28.

³ The case is reported as *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 139.

In *In re Martin. Loustalan v. Loustalan*,¹ the testatrix, a French subject, had made a holograph will in accordance with the French form. The will was made whilst the testatrix resided in England; at that time, she was unmarried. Subsequently, the testatrix married a French professor, who had fled France to escape prosecution for an offence alleged to have been committed by him.

Shortly after the expiration of the time provided by French law for the institution of criminal prosecution, the professor separated from the testatrix and retired to France. There he was domiciled when the testatrix, who had not left England, died.

Two questions relating to domicile arose. First the question whether the holograph will of the testatrix was valid or not. The answer depended on the domicile of the testatrix at the time of her death. If at that moment she had to be considered as domiciled in France, the will was good because French law admitted the holograph form; if she was domiciled in England the will was bad for want of attestation. The Court decided that the testatrix had to be considered as domiciled in France because her husband lived there and she—as a dependent person—shared in law the domicile of her husband.

The second question relating to domicile was whether the will of the testatrix was revoked by her marriage to the fugitive professor. According to English law, the will was revoked; according to French law, its validity was not affected by the marriage. Whether English or French law was applied, depended on the domicile of the husband at the time of the marriage.

The President and Lindley, M.R., decided that at the time of the marriage the husband had not lost his French domicile of origin because he had left France as a fugitive under moral compulsion. Lindley, M.R., attached particular weight to the fact that after a limited period he would be safe to return to his domicile of origin. The majority of the Court of Appeal (Rigby, L.J., and Williams, L.J.), on the other hand, inferred from the facts of the case that the professor intended at the time of his marriage to make England his permanent home. In consequence, the will was regarded as revoked.

The domicile of persons living in exile for political or racial reasons is subject to similar considerations. Again, we have to conclude from the circumstances whether the residence in the country of refuge is accompanied by the intention to stay there permanently or whether the *de cuius* considers his presence in that country as a provisional measure caused by moral compulsion.

In *De Bonneval v. De Bonneval*,² the question was whether the testator, the Marquis de Bonneval, was domiciled in France or England. The testator was a French aristocrat who fled from France in 1792 in consequence of the Révolution. A year later he took up residence in England and received an allowance from the Government as a French emigrant. On the return of the Bourbons in 1814, he went back to France. When Napoleon escaped from Elba in 1815, he came again to England, but he returned apparently to France after Waterloo. He died in England in 1836. From 1814 till 1836, he lived partly in France and partly in

¹ [1900] P. 211.

² (1838), 1 Curt. 854.

England. He acquired some leaseholds in England but inherited also property in France. He spent considerable sums of money on his house in England, but he also purchased part of his brother's paternal inheritance in France. He made declarations of domicile apparently in both countries.

Sir Herbert Jenner held that the Marquis's presence in England was "compulsory" till 1814, and that, on the whole, he had done nothing to "disunite" himself from France. In consequence, it was held that he never lost his French domicile.

De Bonneval's case shows that the question whether or not an exile has acquired a domicile in the country of refuge, is, again, a question of fact.¹ It may well be that one emigrant has never disunited himself from his native country, whilst another refugee from the same political event may quickly decide to constitute the country of refuge his permanent home. The latter conclusion may be more easily drawn if the *de cuius* has left his country not so much for reasons of personal danger as of indignation and conscientious scruples. Many persons, e.g. the Pilgrims of the *Mayflower*, the Huguenots or the refugees from Nazi oppression left their country with the intention of adopting the country of their final refuge as their permanent home.

C. No other elements than residence and intention are required.

It has been seen that the acquisition and abandonment of a domicile of choice depends on the concurrence of the physical fact of residence and the mental fact of intention. In no case² is an additional element necessary. This is particularly so with respect to persons residing in oriental countries. At one time, it was thought that in oriental countries the additional criterion was necessary that the *de cuius* intended to merge "in the general life of the native inhabitants."³ This view was, as Professor Cheshire⁴ has shown, erroneous at the root. It was based on the experience that in Eastern countries members of the Western nations frequently formed separate communities living under privileges—Capitulations—granted by Eastern rulers. Domicil, however, is a means of connection with a territorial

¹ See Slessor, L.J., in *Boldrini v. Boldrini*, [1932] P. 18; *May v. May and Lehmann*, [1943] 2 All E.R. 146.

² Formerly an exception existed in the case of the so-called Anglo-Indian domicile. Servants of the East India Company were held to have a domicile in India though they intended to retain their previous domicile in England and to return to this country after their term of office. The reason was that these servants were bound to life service. The rules relating to the Anglo-Indian domicile which were generally considered anomalous are now obsolete; Dicey, 5th ed., p. 133, No. 10; *Jopp v. Wood* (1865), 34 L.J. Ch. 212, 219; Scrutton, L.J., in *Casdagli v. Casdagli*, [1918] P. 89, 113.

³ Swinfen Eady, L.J., in *Casdagli v. Casdagli*, [1918] P. at pp. 89, 99.

⁴ Cheshire, 3rd ed., pp. 210-12, 228-9.

legal system, and not with a particular community. Such community, if enjoying extritoriality from the jurisdiction of the national courts, derives its capitulary privileges ultimately from the same sovereign power that legislates for the rest of the inhabitants of the territory.

On the other hand, the conditions of life in an Eastern country may be so different from those prevailing in Western countries that an overwhelming presumption may exist that the *de cuius* did not intend to make that country his permanent home. The difference in the mode of living is, however, nothing more than an incident that has to be taken into consideration when the mental fact of intention of the *de cuius* is examined. It is naturally a weighty incident. "Of course, the condition of that foreign country may be so barbarous as to make it so unlikely that he should have intended to make it his home, in the full sense of accepting its institutions as his own, that he may not have the intention to do so imputed to him."¹

The thesis that an additional criterion was required in the case of a domicil in oriental countries was finally exploded in *Casdagli v. Casdagli*.²

In that case, the wife petitioned for a divorce in the English courts and the husband pleaded that the English courts had no jurisdiction to entertain the petition because he was domiciled in Egypt.³ Both parties were of Greek origin; the husband was a British subject and had a British domicil of origin. He had acquired a permanent home in Egypt and was registered at the British Consulate in Alexandria as a British born subject. At that time the jurisdiction over registered British residents in Egypt was vested in the Mixed Tribunals, but divorce proceedings were subject neither to the jurisdiction of the Mixed Tribunals nor to that of other Egyptian courts.

The wife's case was that the registration of her husband as a member of a privileged community prevented him from acquiring an Egyptian domicil. The respondent, on the other hand, argued that no additional criterion was necessary with respect to his domicil of choice in Egypt and that he had duly acquired such domicil there. The House of Lords, following a memorable dissenting opinion of Scrutton, L.J., in the Court of Appeal, gave judgment in favour of the husband.

3. DOMICIL OF DEPENDENT PERSONS.

It has been observed earlier that the term "dependent persons" in this connection includes married women, infants and persons of unsound mind. The principal rule extending to all these cases is that no dependent person can acquire a domicil by his own will.⁴

Every domicil of origin is necessarily the domicil of a dependent person⁵ as it is acquired at birth, i.e. during minority. It would,

¹ Dicey, 5th ed., Rule 10, p. 109.

² [1918] P. 89.

³ See p. 310 *post*.

⁴ Dicey, 5th ed., Rule 10, p. 109.

⁵ P. 69, 74, *ante*.

however, be erroneous to reverse this statement by saying that a domicil of a dependent person must always be the domicil of origin. On the contrary, whilst the domicil of origin is unchangeable, the domicil of a dependent person may be changed; but such change is effected by the will of the person on whom the *de cuius* depends, namely, the husband, parent, guardian, or committee.

Thus, if Mr. X being a married man and the father of two minors, changes his domicil by leaving country A and settling down in country B, the domicil of his wife and his children is automatically changed. This would be the result even if the wife preferred to stay in country A rather than to follow her husband to country B, or if the children dispersed into different parts of the world.

A. Married women. The domicil of the married woman follows that of her husband. "Under British law one of the effects of marriage is to give to the spouses a common domicil—that of the husband."¹ The incapacity of the married woman to acquire a domicil of her own subsists only during coverture. After the dissolution of the marriage by a divorce decree, the wife has, again, full capacity of acquiring a separate domicil. Where a voidable² marriage is annulled by the Court, the wife, as from the date when the decree is effective, is capable of acquiring a separate domicil but does not regain this capacity retrospectively.³ Where the marriage is void (and not merely voidable²) she has never lost her capacity of having a separate domicil.⁴

On the other hand, the actual or even judicial separation of the wife from the husband does not restore the wife's capacity to acquire a separate domicil. The result is that in law a deserted wife continues to share the domicil of her husband. This rule worked hardship in cases in which either the abode of the husband was unknown or it was a matter entailing excessive costs or delay to procure a divorce in the foreign country where he had taken his domicil. As the law stood before 1938, the English courts had jurisdiction in matrimonial cases only when the domicil of the husband was within their jurisdiction. The deserted wife, whose husband had acquired a domicil abroad, was, therefore, unable to petition the English courts for a decree dissolving

¹ *Per* Lord Merrivale in *A.G. for Alberta v. Cook*, [1926] A.C. 444, 465; see Dicey, 5th ed., Appendix, "The Domicil of Married Women," at p. 893; see further *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *In re Mackenzie*, [1911] 1 Ch. 578; *Delphin v. Robins* (1859), 7 H.L. 390.

² On voidable and void marriages see p. 321, *post*.

³ *De Reneville v. De Reneville* (1948), 64 T.L.R. 82.

⁴ *Ibid.*, and *White v. White*, [1937] P. 111.

her marriage. Several attempts were made from the Bench in undefended petitions by deserted wives¹ to admit an exception to the well-established rule that the wife shares the domicile of her husband. The admission of this exception was, however, rejected by subsequent decisions, in particular in *Attorney-General for Alberta v. Cook*² and *Herd v. Herd*.³ An Act of Parliament was necessary to amend the law. The Matrimonial Causes Act, 1937, which came into force on 1 January, 1938, provides by Sect. 13 that the English courts shall have jurisdiction to entertain the petition of a deserted wife whose husband was domiciled in England immediately before the desertion.⁴

B. Minors. With respect to *minors*, the law appears to be as follows: The domicile of a legitimate,⁵ or legitimated⁶ infant is that of the infant's father, and the domicile of an adopted infant is that of the infant's adopting father. This rule is the consequence of the father's position as head of the family. If the father is dead, the mother takes his place and her domicile is shared by the legitimate, legitimated or adopted child.⁷ The domicile of an illegitimate or posthumous child depends on that of the mother.

According to English law, the infant is in no circumstances capable of acquiring an independent domicile during the life of his father. The father is not entitled to "emancipate"⁸ the child, and the law will not admit such emancipation in case of the marriage of the son or of his entry into the public service of the country. In case of the marriage of an infant daughter, her domicile ceases to depend on that of the father (even if she marries without his consent) and becomes dependent on that of her husband. American law,⁹ on the other hand, vests in the father the power to sever the connection between his domicile and that of the children: the American father can authorise the children to separate and acquire their own permanent home, i.e. in case of the infant earning an independent income. Further, according to American law, an infant son on marriage is emancipated by operation of law. This difference in outlook finds, again, its explanation in the different social structure of the two countries.

¹ *Bater v. Bater*, [1906] P. 209, 215; *Stathatos v. Stathatos*, [1913] P. 46; *De Montaignu v. De Montaignu*, [1913] P. 154.

² [1926] A.C. 444 (a Privy Council Case).

³ [1936] P. 205.

⁴ See p. 317, *post*.

⁵ See p. 273, *post*.

⁶ Under the Legitimacy Act, 1926; see p. 280, *post*.

⁷ *In re Beaumont*, [1893] 3 Ch. 490; *Polinger v. Wightman* (1817), 3 Mer. 67; see the American case *Brown v. Lynch*, 2 Bradf. Surrogate Rep. (N.Y.) 214.

⁸ Dicey, 5th ed., Rule 10, at p. 109; Baty, *Polarised Law*, p. 110; a different view is taken by Westlake, 7th ed., 345, para. 249.

⁹ 1 Beale, 212.

It is sometimes contended that there exists in English law a difference according as to whether an infant's domicile depends on that of the father or on that of the mother. It is said that, whilst the father has in no circumstances the power to emancipate the children, the mother may assign a separate domicile to the children if the welfare of the children so requires.¹ The English cases do not support this view in such generality. They admit, however, an exception if the mother remarries and becomes herself dependent on the domicile of her second husband. Here, no inherent reason of natural paternal relationship demands that the infant's domicile should become automatically dependent on that of the stepfather. This conclusion might be detrimental to the interests of the children. All depends here on the intention of the mother at the time of her re-marriage. If the mother decides that the children by her first husband shall join the stepfather's home, she thereby exchanges not only her domicile but also that of the children for the domicile of the second husband. On the other hand, if the mother separates from the children and follows her second husband alone, the minors retain the last domicile of their mother before her re-marriage and do not follow a change in the domicile of the stepfather.² In short, here the actual position has to be ascertained, namely whether the children share the stepfather's home or not.

It is further maintained that a change in a minor's domicile following a change in the mother's domicile is inoperative if the mother was actuated by fraudulent motives, e.g. if she has changed the infant's domicile for the purpose of diminishing his rights of inheritance. No English case can be quoted in support of this contention.³ Professor Keith, the late editor of the 5th edition of Dicey's *Conflict of Laws*, observes rightly that this rule if stated in such form does not appear to be compatible with the modern tendency of equality between the sexes⁴ and that it should equally apply to the father's fraudulent change of domicile of the children. It can be safely assumed that no English court would recognise a change of domicile for the purpose of defrauding the dependents and it would be immaterial whether the fraudulent change was perpetrated by the father or the mother. It may, however, be easier to establish the fraud in the latter case;

¹ The American case *Brown v. Lynch*, 2 Bradf. Surrogate Rep. (N.Y.) 214 (quoted in *Re Beaumont*, [1893] 3 Ch. 490, 495).

² The decision in *Re Beaumont*, [1893] 3 Ch. 496-7 does not go further than this.

³ In *Pottinger v. Wightman* (1817), 3 Mer. 67 no fraud was present.

⁴ Sex Disqualification (Removal) Act, 1919.

such fraud may even be presumed if no other reasons appear for the change of domicile than the intention to damage the infants.

The position of a child that is legitimated by subsequent marriage is not quite so clear. This question is of importance since legitimation has been introduced into English law by the Legitimacy Act, 1926.¹ Until the date of marriage of the parents, the child's domicile of origin is clearly the domicile of the mother at the time of the birth of the child. According to Dicey² and Westlake,³ the subsequent legitimation does not affect this position and the child's domicile of origin continues to be the mother's domicile at the birth of the child. According to the present editor of Westlake⁴ and the American *Restatement*⁵ the subsequent marriage relates back, and the child's domicile would become that of the father as from the time of its birth. The view that the subsequent marriage does not affect the previous domicile of origin would appear to be more consistent with the tenacity with which the domicile of origin clings to the *de cuius* in the English conflict of laws.

An orphan retains the domicile which the father had when he died, and the orphan will not be affected by any change in the domicile of the appointed guardian.⁶ Similarly, a fatherless minor whose natural guardian⁷—e.g. the mother⁸ or one of the grandparents—has died, retains the last domicile of the natural guardian. A foundling is domiciled at the place where it is found.⁹

C. Persons of unsound mind. In the case of a person of unsound mind, a distinction has to be drawn between the case of the unsoundness of mind having occurred when the *de cuius* was already *sui juris* or during his minority. In the first case, the last domicile of the *de cuius* will remain his domicile during the time of the lunacy; it will not be changed by a change in the domicile of his committee, whether the natural guardian or one appointed by the court. In the second case, "the same reasoning which attaches the domicile of the son to that of his father while a minor would continue to bring about the same result after the son had attained majority."¹⁰ Here, the same distinction between natural guardian and appointed guardian has to

¹ See p. 283, *post*.

² 5th ed., p. 82.

³ In his 1st ed., p. 35.

⁴ 7th ed., 1925, Para. 248, s. 344.

⁵ Para. 34, p. 59.

⁶ Westlake, 7th ed., p. 345, para. 250.

⁷ On the natural guardian in American Law see *Restatement* (p. 62, sec. 39).

⁸ A widow may be deprived of the guardianship by the Court under the Guardianship of Infants Act, 1925, s. 5 (4).

⁹ A refugee child is considered for some purposes as domiciled in England; Guardianship (Refugee Children) Act, 1944, Sect. 1 (3) (b); on the definition of "refugee children" see p. 288, *post*.

¹⁰ Sir J. P. Wilde in *Sharpe v. Crispin* (1869), L.R. 1 P. & P. 611, 618.

be applied as was discussed with respect to orphans. A person of unsound mind whose incapacity occurs during minority continues, therefore, after coming of age to follow the domicile of the father and probably of any other natural guardian but his domicile remains unaffected by the change in the domicile of a committee not so related to him.

V. RENVOI

We proceed now to a complicated problem which is commonly called the problem of *renvoi*.^{*} It might arise not only in the province of the law of domicile, but also in other conflictual issues. Though it is of a general character, it can be conveniently dealt with in this chapter because the law of domicile has most frequently given rise to questions of *renvoi* and has become the *locus classicus* of the problem. It should, however, be remembered that the method of ascertaining what is to be understood by the term "law of domicile" applies equally to all cases where it is doubtful what branches of municipal law are comprised in the conflictual conception of "the law of a country."¹

Throughout this chapter, we have referred to the "law of domicile" of the *de cuius* and have discussed the various rules governing the determination of his domicile. It has now to be ascertained what is meant by the term "law of domicile." Does that term refer merely to the internal law administered at the domicile of the *de cuius* or does it also include the conflictual rules prevailing at that place?

When it was universally accepted that the personal relations of the *de cuius* were governed by the law of his domicile, no major issue was likely to arise in this respect. To-day, however, some conflictual systems, notably those of England, the United States of America and Switzerland, adhere to the principle of domicile, whilst others like France, Belgium, Italy and Germany consider the law of nationality as

^{*} For further reading: J. Pawley Bate, *Notes on the doctrine of Renvoi*, London, 1904; A. Mendelsohn-Bartholdy, *Renvoi in modern English law*, Oxford, 1937; John D. Falconbridge, "Renvoi and succession to Movables," in 46 *L.Q.R.* (1930), 465; J. H. C. Morris, "The law of domicile," in 18 *B.Y.B.I.L.* (1937), 32; A. H. Robertson, "The 'preliminary question' in the Conflict of Laws," 55 *L.Q.R.* (1939), 565, and "Characterisation in the Conflict of Laws," *Harvard Studies in the Conflict of Laws*, Vol. IV, 1940. John D. Falconbridge, "Renvoi and the Law of Domicil," in 19 *Canadian Bar Review* (1941), 311.

¹ Thus, in *In re Duke of Wellington*, [1947] 1 Ch. 506; [1948] 1 Ch. 118 (p. 95, *post*), the problem of *renvoi* arose in connection with the *lex situs* of immovable property. In *In re Ross*, [1930] 1 Ch. 377 (p. 94, *post*) questions of *renvoi* arose both in respect of the law of domicile and the *lex situs*.

governing the personal relations of the *de cuius*.¹ This important divergence may give rise to the following situation. Suppose that—

A, a British subject, dies intestate in Brussels. He leaves movables in both England and Belgium. An English Court is called upon to decide whether the movables have to be distributed according to English or Belgian law.

The English court would reason that the distribution of the movables is governed by the personal law of the deceased which, of course, is the law of his domicile. If the English court finds that the deceased was domiciled in Brussels, it will proceed to consider what the law of domicile is. "Does the phrase, so far as the English law is concerned, mean only that part of the domiciliary law which is applicable to nationals of the country of domicile (sometimes called 'the municipal law,' or 'the internal law'), or does it mean the whole law of the country of domicile, including the rules of private international law, administered by its tribunals?"²

1. IN THE ENGLISH DOCTRINE, THE "LAW OF DOMICIL" INCLUDES THE FOREIGN CONFLICT OF LAWS.

The English authorities agree that the term "the law of domicile" has the wider meaning, and includes the rules of the foreign conflictual system.³ "In my view the courts have generally, if not invariably, meant by 'the law of the country of domicile' the whole law of that country."⁴ This attitude of the English courts finds its explanation in the English theory of jurisdiction.⁵ For the English courts, the question of "the law of domicile" is equivalent to the question of the law applied by the courts of the domicile, and that includes the foreign conflictual system.⁶ Moreover, it is in accordance with the doctrine of the vested right that the whole of the foreign legal system in question, the *Recht* (*droit*) as opposed to the *Gesetz* (*lois*),⁷ should

¹ See p. 66, *ante*.

² *Per* Luxmoore, J., in *In re Ross*: *Ross v. Waterfield*, [1930] 1 Ch. 388.

³ *Collier v. Rivaz* (1841), 2 Curt. 855, 859; *In re Annesley*: *Davidson v. Annesley*, [1926] 1 Ch. 692; *In re Ross*: *Ross v. Waterfield*, [1930] 1 Ch. 377; *In re Ashew*: *Marjoribanks v. Ashew*, [1930] 2 Ch. 259; *Kotia v. Nahas*, [1941] A.C. 403; Westlake, 7th ed., p. 38.

⁴ *Per* Luxmoore, J., in *Re Ross*: *Ross v. Waterfield*, [1930] 1 Ch. 377, 390; see also Maugham, J., in *In re Ashew*: *Marjoribanks v. Ashew*, [1930], 2 Ch. 264; Wynn-Parry, J., in *In re Duke of Wellington*, [1947] 1 Ch. 506; see Dicey, 5th ed., at p. 865 note (g).

⁵ See Dicey, 5th ed., p. 869.

⁶ *Kotia v. Nahas*, [1941] A.C. 403; *Collier v. Rivaz* (1841), 2 Curt. 855, 859.

⁷ See Westlake, 7th ed., p. 32: "By *Gesetze* the so-called internal laws of a country are meant, and by *Recht* its whole legal system as resulting from them in combination with its rules of private international law."

be taken into account. Otherwise, a person domiciled abroad might receive in the English courts treatment different from that which he would receive in the courts of his own domicile, though the English courts purport to apply the laws of that domicile.

2. CONSEQUENCES FLOWING FROM THE ENGLISH DOCTRINE.

The English doctrine that the "law of domicile" includes the foreign conflict of laws leads to considerable inconvenience, if the *de cuius* is domiciled in a country which has accepted the law of nationality as the criterion of the personal law. In our illustration on page 90, English law would refer the decision to Belgian law as the law of domicile, and Belgian law would remit the decision to English law as the law of nationality. Here the *reference* of English law to Belgian law (*Verweisung*) has to be distinguished from the *remitter* from Belgian law to English law (*Rueckverweisung*, *renvoi*). The law of domicile may, however, transmit the case to a third country. If, for instance, in our illustration on page 90 an Italian subject had been domiciled in Brussels and having movables in London, the English courts would *refer* the decision on the succession to his movables to Belgian law as the law of domicile and Belgian law would *transmit* (*Weiterverweisung*) the case to Italian law as the law of nationality of the *de cuius*. From the point of view of terminology¹ it should be noted that only the cases of remitter and transmission are styled cases of *renvoi*; the case of an original reference is not so styled.

The invocation of *renvoi* imports a difficulty which seems hardly surmountable. Logically, no reason exists why the foreign conception of the "law of nationality" should not include the English conflict of laws in the same way as the English conception of the "law of domicile" includes the foreign conflictual rules. In our fictitious illustration on page 90 that would mean that on the remitter of the case from Belgian law English law would have to return the case to Belgian law and so forth. We appear here to be entangled in a *circulus inextricabilis*, in a sort of game of legal battledore and shuttlecock, the case being "eternally passed backwards and forwards."² The English and Belgian court appear to "bow to each other like the officers at Fontenoy."³

¹ Great care should be taken with the terminology. Sir Frederick Pollock referred to the danger of terminological confusion with respect to *renvoi*; (*In re Annesley*, [1926] 1 Ch. 708, note). I have followed here the terminology of Dicey, 5th ed., pp. 868-9.

² Dicey, 5th ed., p. 871.

³ *Per* Maugham, J., in *In re Askew: Marjoribanks v. Askew*, [1930] 2 Ch. 267.

3. THE AMERICAN DOCTRINE.

The inconvenience attendant on the introduction of *renvoi* would be avoided if the term "law of domicile" were applied in the narrower sense, viz., as referring merely to the internal law of the foreign place of domicile. This solution has been adopted in the United States.¹ It represents, further, the personal view of Lord Russell² and has been strongly advocated by Dean Falconbridge.³ It has certainly this in its favour that it represents a "simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicile"⁴ and conversely. "The short route" is, however, clearly not in accordance with the English authorities and with the English doctrine.

4. RENVOI IN THE ENGLISH CONFLICT OF LAWS.

Since, according to the English doctrine, the term "law of domicile" includes the foreign conflict of laws, a *renvoi* appears unfortunately unavoidable if the foreign conflict of laws remits the case to English law. There is, in theory, no way of avoiding the *circulus inextricabilis*. It is obvious that, in practice, some means must be found in order to stop the mutual disclaimer of jurisdiction by the English and foreign law.

The test adopted by the English courts is, again, explicable by their view on jurisdiction and the vested right in general. The English courts decide the case as if they were sitting as the foreign courts at the place of domicile of the *de cuius*.⁵

Sir Herbert Jenner said in *Collier v. Rivaz* ⁶—

The Court sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case.

And Wynn-Parry, J., said in *In re Duke of Wellington; Glentanar v. Wellington*,⁷ a case concerned with an English testator who owned immovable property in Spain—

What is the law which would be applied by the Spanish court, if, on the facts which I have stated, the questions as to the devolution of the Spanish property which I have to decide, were being decided by that court?

¹ American Restatement, par. 7 (b), p. 11; Lorenzen, in 27 *Yale Law Journal*, 509, ss; 1 Beale, 56-7; *Re Tallmadge* (Surrogates Court of New York), 1919. Lorenzen's *Leading Cases*, 834; see 35 *Michigan Law Review* (1937), p. 1301.

² As expressed in *In re Annesley*, [1926] Ch. 709.

³ 46 *L.Q.R.* 465; 47 *L.Q.R.* 27.

⁴ Per Russell, J., in *In re Annesley*, [1926] 1 Ch. 709.

⁵ *Kotia v. Nahas*, [1941] A.C. 403.

⁶ (1841), 2 Curt 855, 859.

⁷ [1947] Ch. 506, 514; see also Luxmoore, J., in *Re Ross; Ross v. Waterfield*, [1930] 1 Ch. 377, 390.

The application of this fiction leads to a remarkable change in the terminology: what formerly was a "remitter," becomes now a simple "reference." In our example on page 90 of the Englishman who had died domiciled in Brussels, we saw that—

English law *referred* to the Belgian law of domicil,
and
Belgian law *remitted* to the English law of nationality.

However, as the English courts imagine that they take the place of the Belgian courts, the correct terminology is now that—

Belgian law (as applied by the English courts by virtue of the fiction) refers to English law (as the law of nationality),
and
English law remits to Belgian law (as the law of domicil).

All depends now on whether the Belgian conflict of laws accepts or rejects the remitter (*renvoi*) from English law. Since

Belgian law refuses to accept the remitter, English internal law applies.

Conversely, if the foreign law accepts the remitter, as German law does (supposing A had died domiciled in Hamburg), the position would be—

German law (as applied by the English courts by virtue of the fiction) refers to English law (as the law of nationality),
and
English law remits to German law (as the law of domicil).
German law accepts the remitter; and consequently German internal law applies.

These rules are illustrated by the three leading cases of *In re Askew*; *Marjoribanks v. Askew*,¹ *In re Ross*; *Ross v. Waterfield*,² and *In re Duke of Wellington*; *Glentanar v. Wellington*.³

In *In re Askew*; *Marjoribanks v. Askew*,¹ the question of *renvoi* arose in connection with the personal law of the *de cuius*.

In this case, a trust fund had been constituted in an English marriage settlement, conferring, *inter alia*, power on the husband to appoint, in case of re-marriage, part of the fund for the benefit of the surviving (second) wife or any children of the second marriage.

¹ [1930] 2 Ch. 259.

² [1930] 1 Ch. 377.

³ [1947] Ch. 506; *affd.* by C.A., [1948] 1 Ch. 118.

The husband had acquired a domicile in Germany and had married for the second time. His second wife had, before the marriage, given birth to a child which had been acknowledged by the husband as his child and, after the marriage, the husband had exercised in favour of the child the power of appointment in the marriage settlement. After the death of the husband in 1929, the problem arose whether the child was a person in whose favour the power of appointment could validly be exercised. The solution of this problem depended on the question whether the child had acquired the status of legitimation by the subsequent marriage of its parents. The trustees of the trust fund asked the court to determine this question.

According to English Common Law the child would have been legitimated if the law of the father's domicile both at the time of the birth of the child and at the subsequent marriage recognised the institution of legitimation by subsequent marriage. The law of the father's domicile was at both relevant dates German law, but that law, unlike English law, regarded the law of nationality as the test of legitimation. Thus a question of *renvoi* arose which was complicated by the fact that by English internal law the child would have been illegitimate because it was the result of an adulterous union (Legitimacy Act, 1926, Sect. 1 (2)), whereas by German internal law (which did not recognise a similar restriction) the child would have been legitimated.

The English court decided the case by applying the *lex domicilii* of the latter i.e. German law to the same extent as it would have been applied by the German courts. Since the German courts would have applied English law (including the English conflict of laws) as the law of nationality of the father, and since English law would have remitted the case to German law as the law of domicile, the solution depended on the attitude adopted by the German courts to that remitter (*renvoi*). It was proved that the German courts would have accepted the *renvoi* and applied, at that stage, German internal law.

In the absence of an element contravening the general policy of English law, the English court likewise adopted this law, and held that the child had duly acquired the status of legitimation.

In *In re Ross*; *Ross v. Waterfield*,¹ the question of *renvoi* arose both in connection with the law of domicile and the *lex situs*.

An Englishwoman whose domicile of choice was in Italy had by her will left all her property (situate in both England and Italy) to distant relatives, to the exclusion of her only son. After her death her son claimed, in the English courts, as the legal portion to which he would have been entitled by Italian law, a moiety of her movable and immovable property situate in Italy and a moiety of her movable property situate elsewhere than in Italy. The beneficiaries under the will resisted the claim, maintaining that English internal law (by way of *renvoi* from Italian law) governed the issue.

The court after stating that the succession to the movables of the testatrix was governed by the *lex domicilii*, and to her immovables by the *lex situs*, went on to determine each of these *leges* separately.

As regards the *lex domicilii*, it was clear that Italian law (including the Italian conflict of laws) applied. The English court had therefore

¹ [1930] 1 Ch. 377.

to determine the issue as the courts of Italy, if called upon to decide it, would have decided it. Italian law referred the decision to English law as the law of nationality of the testatrix, and English law remitted it to Italian law as the law of her domicile. Since Italian law refused to accept the remitter (*renvoi*), English internal law applied.

As regards the *lex situs*, the same problem of *renvoi* arose, and was determined by Luxmoore, J., on similar principles. "In my view," said the learned Judge, "the *lex situs* must, for reasons I have already stated with regard to the meaning to be placed on the phrase 'law of the domicile,' be construed in the way as the courts of the country where the immovables are situate would themselves determine." Since Italian law, in this respect also, refused to accept the *renvoi*, the plaintiff likewise failed as regards his claim to the moiety of the immovables in Italy.

In *In re Duke of Wellington; Glentanar v. Wellington*,¹ the problem of *renvoi* arose in connection with the *lex situs* of Spanish estates bequeathed by an English testator.

In 1813, the Spanish dukedom of Ciudad Rodrigo was given to the First Duke of Wellington and his male and female issue, together with certain Spanish estates, whereas the British dukedom of Wellington was limited in tail male. Until 1943, no separation of the Spanish and British titles took place because all heirs to the title were males, but in 1943, the Sixth Duke of Wellington, who was unmarried, was killed in action and his sister succeeded him to the Spanish dukedom while his uncle became the Seventh Duke of Wellington.

The Sixth Duke had made two wills, the so-called "Spanish will" wherein he bequeathed his Spanish estates to the "Duke of Wellington and Ciudad Rodrigo," and the "English will," whereby he gave all such property as was not disposed of by the Spanish will, to the "Duke of Wellington." As a holder of both titles was not in existence at the death of the Sixth Duke, it became necessary to ascertain the law governing the interpretation of the bequest relating to the Spanish estates.

Wynn-Parry, J., held that, according to English law, the devolution of immovable property situate in Spain was governed by Spanish law as the *lex situs*. The phrase "Spanish law" included the Spanish conflict of laws according to which the question was referred to the "national law of the deceased." This raised a problem of *renvoi*, and in particular the question whether *renvoi* was accepted or rejected by Spanish law. The expert evidence before the learned judge was conflicting, and so were the decisions of the lower Spanish courts. Wynn-Parry, J., decided the point as if he were sitting as the Supreme Court of Spain and concluded that that court would have rejected the *renvoi* from English law.

The testamentary dispositions relating to the Spanish estates had, therefore, to be interpreted according to English municipal law. According to the English canons of construction, the bequest in the Spanish will was invalid and the Spanish estates fell into the residue disposed of by the English will in favour of the Seventh Duke.

5. WHERE RENVOI BREAKS DOWN.

The doctrine that the English courts decide the case as if they were sitting as the foreign courts at the place of the domicile of the *de cuius*

¹ [1947] Ch. 506; *affd.* by C.A., [1948] 1 Ch. 118.

makes inevitable the adoption of the test of nationality by the English courts in those cases where the foreign law does not accept the remitter from English law; e.g. if the *de cuius* was domiciled in Italy. This involves a particular difficulty in the case of the British Commonwealth of Nations which, whilst admitting one British nationality only, is composed of several legal units.

The British Empire consists of a large number of states, countries, and colonies, and differs from Continental nations in that it does not impose its own laws wherever its sway extends, but admits many different systems of law within its bounds. There is no uniform law of this Empire which can be taken for this purpose as the law of the nationality of the *propositus*. To what nationality, then, does the *propositus* belong, or of whom is he a subject? ¹

This question should, again, be decided in the English courts in the same manner as the foreign courts sitting at the domicile of the *de cuius* would decide it, but if the foreign law does not suggest an alternative law, the English courts will solve the problem by resorting to the legal attribute which is never lost though it may be in abeyance,² i.e. the domicile of origin. Thus, in a case where a British testatrix (who was born in a territory now part of Eire) died domiciled in Italy without leaving a will, it was held that her movable estate must be distributed according to the law of Eire.³

6. CRITICAL REVIEW OF THE ENGLISH DOCTRINE.

It has been maintained that the English doctrine introduces an element of uncertainty into the ascertainment of the rights of Englishmen domiciled abroad. The determination of foreign law in English courts is a question of fact. It has, therefore, to be proved by expert evidence whether *renvoi* is accepted or rejected by the foreign law. The foreign experts may, it has been argued, disagree on the rules of their law on *renvoi*. Maugham J. demanded, therefore, in *In re Askew* ⁴ a short statute to ensure that the meaning of the term "law of domicile" should be made clear in the case of British subjects domiciled abroad, either by adopting Lord Russell's suggestion that the term should be construed as referring to the internal law prevailing at the domicile of the *de cuius* or by providing that the internal law of England should govern the case. Such a statute would remove the difficulties of *renvoi* in the province of the law of domicile but would complicate the position in cases where *renvoi* arises in connection

¹ Per Farwell, J., in *In re Johnson*, [1903] 1 Ch. 821, 832.

² p. 71, *ante*.

³ In *Re O'Keefe*, [1940] 1 Ch. 124; *In re Johnson*, [1903] 1 Ch. 821.

⁴ [1930] 2 Ch. 259.

with the *lex situs*. If the proposed statute were extended to these cases, the succession to foreign immovables might be adjudged, in the English courts, by a law different from that which would be applied to the issue in the courts of the *lex situs*, and if the statute did not extend to these cases, English law would have to admit two different rules for the solution of *renvoi*. Moreover, it may be doubted whether the suggested solution would satisfy the requirements of substantial justice. It cannot be overlooked that the different treatment of individuals domiciled in various foreign countries, or having acquired vested rights there, is due, not to an oscillation in the rules of the English conflict of laws, but to the different conflictual systems prevailing at these foreign places. If Englishmen acquire a domicile or vested rights in a foreign country, they subject themselves thereby to the foreign legal notions prevailing there. The test evolved by the English courts, though not easy to apply,¹ ensures at least that the same law is applied to the issue in the English court as, in the judgment of the English judge, is applied by the competent foreign court. The task of the English judge would be greatly facilitated if an international convention were concluded wherein the contracting powers state authoritatively whether, and upon which conditions, their law accepts or rejects *renvoi*. Such a convention would reduce the risk that the foreign experts might disagree on the position of *renvoi* in their own legal system. Even in the absence of a convention, the risk of such disagreement is not general because in some countries, like France and Italy, a *jurisprudence constante* has been developed and in others, like Germany, statutory provisions cover the question.² Furthermore, litigation in the English courts has clarified the position in respect of some countries, and precedents can now be quoted for the proposition that German³ law accepts *renvoi* while Belgian,⁴ Italian,⁵ and Spanish⁶ law reject it.

¹ Wynn-Parry, J., in *In re Duke of Wellington*; *Glentanar v. Wellington*, [1947] Ch. 506, 515; *affd.* by C.A. [1948] 1 Ch. 118.

² See Sir Frederick Pollock's footnote to *In re Johnson*, [1903] 1 Ch. 821, 831.

³ *In re Askew*; *Marjoribanks v. Askew*, [1930] 2 Ch. 259.

⁴ *Collier v. Rivaz* (1841) 2 Curt. 855.

⁵ *In re Ross*; *Ross v. Waterfield*, [1930] 1 Ch. 377.

⁶ *In re Duke of Wellington*; *Glentanar v. Wellington*, [1947] Ch. 506; [1948] 1 Ch. 118.

PART II: CHOICE OF LAW

Division I: The Law of Contract and Torts

CHAPTER V

THE LAW OF CONTRACT *

I. THE DOCTRINE OF THE PROPER LAW

1. INTRODUCTION.

A. Liberty of Contracting in English Law. It is an important maxim of the Common Law that persons should be at liberty to arrange their contractual affairs according to their discretion; the law will only interfere if required to do so by the superior requirements of society, or, in technical language, by public policy. The principle of liberty of contracting has found its classical expression in the following words of Jessel, M.R.: ¹ "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting."

The law of contract attributes a particularly exalted position to the intention of the parties. In the countries which have built up their law on the civil law, the incidents relating to the discharge of the obligation are generally laid down in express provisions in the respective codes. These enactments provide, for instance, under what conditions the performance of a contract shall be regarded as frustrated or what principles shall govern the measure of damages. In the Common Law such statutory aids are largely absent; the solution has here to be found by reverting to the ultimate source of the agreement: the will of the parties. The Common Law judges deduced the rules governing the breach of contract from the same principle which dominates the formation of it, namely, the express or implied intention of the parties. Rules like those in *Taylor v. Caldwell* ² or *Hadley v. Baxendale* ³ rest on the principle that the contract shall be governed in all respects by the intention of the parties.

* **For further reading:** J. Foster, "Some defects in the English rules of conflict of laws," in 16 *B.Y.B.I.L.* (1935), p. 84.

¹ *Printing & Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462; see also Swift, J., in *Beresford v. Royal Insurance Co. Ltd.*, [1936] 2 All E.R. 1059.

² (1863), 3 B. & S. 826, 833; and *F. A. Tamplin Co. v. Anglo-Mexican Co.*, [1916] 2 A.C. 397; see now the Law Reform (Frustrated Contracts) Act, 1943; the conflictual aspects of the Act are discussed by Falconbridge, p. 357.

³ (1854), 9 Exch. 341.

B. Connection with the doctrine of the proper law. It is not surprising, therefore, that the courts, when examining the consequences of a contract extending over several legal units, resorted to the same fundamental principle. The English courts held that such a contract is governed by the legal system to which the parties intended to submit their agreement. The "proper law" of the contract is the law which the parties have expressly or impliedly intended to apply. This doctrine, for brevity's sake called the doctrine of the proper law, is comprehensible in its fundamental nature only if connected with the position attributed to the intention of the parties in the general English law of contract. It is but the application, in the province of the conflict of laws, of the general rule that the parties are at liberty to regulate their contractual relations according to their discretion. At the same time, it is a practical consequence of the juristic assertion that the conflict of laws forms part of the municipal system of law.

If conflictual disputes arise in connection with persons or tangible objects, the analytical examination will always take as the starting point some natural link of connection. The obvious point of connection is, in the case of persons, the domicile of the *de cuius*; and, in the case of tangible objects, the *situs* of the land or thing. It is difficult to discern a natural point of connection in the case of legal abstractions such as contracts. It is merely a figure of speech to allocate a "seat" ¹ to an obligation. However, it appears natural to attach great weight to the place where the contract was concluded (*lex loci contractus*) for "whoso goes to Rome must do as those at Rome do." ² Dicey comments on the importance attached to the *lex loci contractus* particularly by early authorities, and he also points to the substantial change which this conception later underwent without alteration in the terminology. He says ³—

English judges, when, a couple of centuries ago they were for the first time called upon to deal frequently with the conflict of laws, no doubt conceived that matters of form, matters of substance, and, in short, everything connected with a contract except matters of procedure, were governed by the *lex loci contractus*, and these words they interpreted as meaning "the law of the place where the contract was made." . . . English courts soon found it necessary,

¹ Savigny, *System* (transl. Guthrie), 2nd ed., Edinburgh, 1880, para. 370, p. 197.

² *Per Willes, J.*, in *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115, 121.

³ Dicey, 5th ed., p. 885. See also 1 Beale, 1082. Foote, 5th ed., p. 375, says: "The *lex loci contractus* has always been an ambiguous term, which jurists had interpreted either as the *lex loci celebrationis* or *solutionis*, the law where the contract was entered into, or of that, where it was to be performed according to the tendency of their peculiar use."

when interpreting contracts which contained in them some foreign element, to give effect to other laws besides the law of the place where the contract was made, and especially, as regards the mode of performing a contract, to the law of the place of performance (*lex loci solutionis*.) This change of doctrine was, as often happens in the case of judicial legislation, combined with verbal adherence to an old formula not really consistent with the new theory. The expression *lex loci contractus* was retained, but was re-interpreted so as to mean "not the law of the country where a contract was made," but the "law of the country with a view to the law whereof a contract was made."

Dicey's observations describe the process by which the courts came to admit a qualification of the "instinctive" ¹ test of the *lex loci contractus* in cases where the law of the place of performance (*lex loci solutionis*) appeared more appropriate. It was soon recognised that neither the *lex loci contractus* nor the *lex loci solutionis* covered all cases, and that these two rules were merely expressions of a third principle of much more general application, namely that the contract is governed by the law which the parties expressly or presumably intended to apply to it. A reference to this doctrine, which as we have seen is termed the proper law doctrine, is already to be found in a judgment of Lord Mansfield ² which can be considered as the historical origin of the proper law doctrine in English law.³

2. THE PRESENT POSITION.

A. Statement of the doctrine of the proper law. To-day the doctrine of the proper law is recognised as the undisputed rule of the English conflict of laws, as far as contractual issues are concerned.

The doctrine has been stated by Lord Atkin in *R. v. International Trustee* ⁴—

The legal principles which are to guide an English Court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the Court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion the Court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law: e.g. the country where the contract is made, the country where the contract is to be performed, if the contract relates

¹ 2 Beale, 1171.

² In *Robinson v. Bland* (1760), 2 Burr. 1077, 1078; the reports in 1 W.Bl. 234 and 256 are slightly different.

³ 2 Beale, 1093.

⁴ [1937] A.C. 500.

to immovables the country where they are situate, the country under whose flag the ship sails in which goods are contracted to be carried. But all these rules but serve to give *prima facie* indications of intention. They are all capable of being overcome by counter-indications, however difficult it may be in some cases to find such.

Another statement of the doctrine of the proper law is contained in a famous passage by Bowen, L.J., in *Jacobs v. Crédit Lyonnais*¹—

The first matter we have to determine is, whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts. What is to be the law by which a contract or any part of it is to be governed or applied, must be always a matter of construction of the contract itself as read by the light of the surrounding circumstances. Certain presumptions or rules in this respect have been laid down by juridical writers of different countries and accepted by the courts, based upon common sense, upon business convenience and upon the comity of nations; but these are only presumptions or *prima facie* rules that are capable of being displaced whenever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction.²

B. The express intention of the parties. The determination of the proper law of the contract will not involve any difficulty if the parties have been wise enough to record expressly which legal system is to apply to their agreement.³ Thus, the contract of loan which had to be interpreted in *Feist v. Société Intercommunale Belge d'Electricité*⁴ stated expressly "that the bond shall be construed and the rights of the parties regulated according to the law of England and as a contract made and according to the terms thereof to be performed in England." However, we shall see later⁵ that the discretion of the parties to elect the proper law is not unlimited and more particularly that it must be exercised *bona fide* and for a lawful purpose.

C. The presumed intention of the parties. A problem of great perplexity arises if the parties have omitted to express the law which is to govern their agreement. The difficulty is enhanced by the experience that, in many cases, the possibility of a conflict of laws was

¹ (1884), 12 Q.B.D. 589, 599-600.

² Other statements of the proper law doctrine are contained in *Lloyd v. Guibert* (1865), L.R. 1, Q.B. 120, 122, 123, *per* Willes, J.; in *Hamlyn & Co. v. Talisher Distillery*, [1894] A.C. 202, 212, *per* Lord Watson; in *British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 1 Ch. 354, 381, *per* Swinfen Eady, J.

³ The draftsman of an international agreement should take care to provide expressly for the application of a particular territorial legal system.

⁴ [1934] A.C. 161.

⁵ See p. 108, *post*.

clearly absent from their mind. The "presumed intention" of the parties has, therefore, to be inferred from the surrounding circumstances of the contract. This is a problem of case connection similar to but no less complex than the problem of ascertaining a domicile of choice. It can hardly be disputed that in many cases the search for the presumed intention means actually that the courts insert in the contract a provision which the parties would probably have inserted if "their attention had been directed to contingencies which escaped their notice."¹ So far, Westlake's observation is true that the intention is in fact "fictitious." In these cases the task of the court is to find out "that law with which the contract has the most real connection."² However, even in these cases the criterion of the "presumed intention" is not an empty phrase. A contract may reveal an unusual state of mind of both parties. In such a case, the court, when determining the "presumed" intention of the parties, will, it is believed, also take into account the peculiar mental attitude of the parties as revealed by the express provisions of the agreement, and will decline to be guided only by the consideration of what reasonable men can be supposed to have intended in circumstances such as those surrounding the case.

All facts and incidents of the case have to be examined for the ascertainment of the intention which the parties presumably had with respect to the proper law of the contract. The "complexion"³ of the contract, "the character of the contract and the nature of the transaction"⁴ have to be considered; "one must look at all the circumstances:"⁵ and it should not be overlooked that "the intention must be the intention of both, not of one party alone."⁶ "Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity: and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal."⁷ The single facts to which the courts have attached

¹ Dicey, 5th ed., p. 666.

² Westlake, 7th ed., p. 303, Sect. 212; Kekewich, J., in *South African Breweries Ltd. v. King*, [1899] 2 Ch. 173, 183, approves of this passage by Westlake.

³ Per Lord Atkin in *R. v. International Trustee*, [1937] A.C. 500, 554.

⁴ Per Bowen, L.J., in *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589, 601.

⁵ Per Brett, L.J., in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, 529; and see Sellers, J., in *Kadel Chajkin, Ltd. v. Mitchell Cotts & Co.* (1948), 64 T.L.R. 89, 90.

⁶ Per Lord Russell in *R. v. International Trustee*, [1937] A.C. 500, 557; *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo. P.C. (N.S.) 272, 292.

⁷ Per Bowen, L.J., in *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589, 601.

importance, are manifold. Among them are: the place where the contract has been concluded,¹ the place where the contract has to be performed,² the language and terminology employed by the parties,³ the form of the documents made with respect to the transaction,⁴ the personality of the parties,⁵ the subject-matter of the contract,⁶ a submission to arbitration,⁷ the situation of the funds which are liable for the discharge,⁸ or security of the obligation, a connection with a preceding transaction,⁹ the effect attributed to the transaction by a particular legal system.¹⁰ To some of these facts the courts have attached more weight than to others, and thus certain presumptions designed to assist in the determination of the proper law of the contract have been evolved. These presumptions have one feature in common: they are in the nature of *prima facie* inferences only, rebuttable by the surrounding circumstances of the case. Some of these presumptions are of a general character. There exists, for instance, a strong presumption in favour of the *lex loci contractus* if the place of conclusion and performance of the contract are identical. The parties can, further, be presumed to have subjected at least that part of their agreement that refers to performance to the *lex loci solutionis* if the

¹ *Lloyd v. Guibert* (1865), L.R., 1 Q.B. 115, 122; *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589, 596-7, 600; *P. & O. Steam Navigation Co. v. Shand* (1865,) 3 Moo. P.C. (N.S.) 272; *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, 326; *British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 1 Ch. 354, 381; *Boissevain v. Weil*, [1948] 1 All E.R. 893, 895.

² *Lloyd v. Guibert* (1865), L.R., 1 Q.B. 115, 122; *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202; *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, 83; *Benaïm & Co. v. Debono*, [1924] A.C. 514, 520; *Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd.*, [1934] A.C. 122, 145, 151; *Ralli Bros. v. Compania Naviera*, [1920] 1 K.B. 614, 630, 631.

³ *Spurrier v. La Cloche*, [1902] A.C. 446, 450; *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, 82; *Kadel Chajkin, Ltd. v. Mitchell Cotts & Co.* (1948), 64 T.L.R. 89.

⁴ *The Adriatic*, [1931] P. 241; *Royal Exchange v. Vega*, [1902] 2 K.B. 384. Where the contract is in writing, all evidence generally admissible for the purpose of construing a written contract is admissible to ascertain the proper law, but direct evidence of intention is inadmissible, *Duke of Marlborough v. A.G.*, [1945] 1 Ch. 78, 89.

⁵ *R. v. International Trustee*, [1937] A.C. 500, 531, 557, 574.

⁶ Whether it is a contract relating to land (*British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 1 Ch. 354, 383) or a contract relating to a marriage settlement (*Re Fitzgerald*, [1904] 1 Ch. 573, 587) or a contract of affreightment (*Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, 327; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, 529), etc.

⁷ *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202, 208; *Spurrier v. La Cloche*, [1902] A.C. 446, 450; *Maritime Insurance Co. Ltd. v. Assecuranz Union von 1865* (1935), 52, 11, L.R. 16.

⁸ *Spurrier v. La Cloche*, [1902] A.C. 446, 450.

⁹ *R. v. International Trustee*, [1937] A.C. 500, 554, 558; but see *South African Breweries Ltd. v. King*, [1899] 2 Ch. 173, 180.

¹⁰ *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo. P.C. (N.S.) 272; *In re Fitzgerald*, [1904] 1 Ch. 573.

place of performance is different from that of conclusion of the contract. Other presumptions are of a special nature, applicable to particular contracts only, e.g. the presumption in favour of the law of the flag as regards contracts of affreightment; that in favour of the matrimonial domicile in the case of marriage settlements; or that in favour of the *lex situs* as regards contracts relating to land. The persuasive force of these presumptions is a matter of degree. In some cases, it is difficult to overcome them. Thus the presumption in favour of the *lex situs* in the case of contracts relating to land is cogent though not conclusive. In other cases (e.g. of the presumption in favour of the law of the flag) the burden of proof required to rebut the established presumption is rather slight. We shall consider in detail the operation of these presumptions later.

D. Universality of the doctrine of the proper law. The examination of the juristic aspects of the proper law doctrine will now be continued. It is necessary to consider whether all the incidents of a contract are governed by this doctrine, or whether different considerations apply to the different aspects of the contract. In short, the problem is whether the capacity to conclude a contract, the form of the contract and its essential validity are all governed by the proper law of the contract. Dicey¹ and Westlake² apply the proper law doctrine only to questions pertaining to essential validity, and treat capacity and form as governed by distinct rules, though Dicey records *passim* "the tendency of English courts to refer every question connected with a contract to the law by which the parties intended the contract to be governed."³ According to Foote, the theoretical principle is that "the intention of the parties should be referred to when interpreting and enforcing a contract in all respects except two—the question of their capacity to contract, and the question of the legality of that for which they have contracted."⁴ Professor Cheshire, whilst treating the proper law doctrine in the traditional way, namely under the essential validity of the contract, has attributed so great an importance to the proper law when dealing with the capacity to contract and the formal validity of the contract that it may seem justifiable to claim his eminent authority in favour of the general application of the proper law doctrine. In connection with the form of the contract, Professor Cheshire makes the following observations: "Judicial statements of a past age cannot now be taken at their face value, for

¹ Dicey, 5th ed., Rules 158–62.

² Westlake, 7th ed., pp. 294–309, Sects. 207–15.

³ Dicey, 5th ed., p. 646.

⁴ Foote, 5th ed., pp. 375, 376.

all they amount to, when rightly considered, is the early nineteenth century method of stating the modern principle of the 'proper law.'"¹ In considering the scope of the proper law in the English conflictual system, the American writers afford little assistance because the attitude of American law differs in this respect from that of English law. The American writers consider not the proper law, but the *lex loci contractus* as the general principle applicable to contracts. This principle coincides with the *lex actus* which is often regarded as governing the capacity and formal validity of a contract. The American jurists arrive, therefore, at a universal principle governing all incidents of a contract without the apparent difficulty encountered in the English conflict of laws. However, Professor Beale, when discussing the English doctrine, expresses the view that "it does not seem theoretically possible, on principles of the Common Law," to support a distinction between capacity and formal validity on the one hand and essential validity of the contract on the other hand.² The view that the rule of the proper law doctrine extends to all incidents of the contract is, it is believed, in accordance with the English judicial authorities. In *Re Missouri Steamship Co.*,³ Chitty J., when discussing whether the principles evolved in construing a contract apply equally to the validity of the stipulations, observes: "Any distinctions founded on the difference of these questions were not rested on substantial ground, and would lead to uncertainty and confusion in mercantile transactions of this character." In *Jacobs v. Crédit Lyonnais*,⁴ Denman, J., after referring to earlier authorities, says the general rule is that the "construction of the contract and all its incidents" are to be governed by certain legal rules. Even Swinfen Eady, J.,⁵ when saying that "in cases where a contract is not immoral nor contrary to public policy, a solution of the question by what law the contract is to be governed is arrived at when it has been ascertained by what law the contracting parties intended it to be governed," admits an exception to the universal application of the proper law doctrine but only for the case of public policy and not for the incidents of capacity and form. It will be observed later that the doctrine of the proper law, like every other conflictual rule, is qualified by the ultimate reservation in favour of the general policy of

¹ Cheshire, 3rd ed., p. 304.

² 2 Beale, 1100.

³ (1889), 42 Ch. D. 321, 327-8; to a similar conclusion came Pearson, J., in *Re Marseilles Extension Railway & Land Co.* (1885), 30 Ch. D. 598, 602.

⁴ (1884), 12 Q.B.D. 596.

⁵ In *British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 1 Ch. 354, 381.

the *lex fori* which can, as we have seen, divest a duly acquired right of the protection usually accorded to it.¹

The result is that, in English law, all the incidents of a contract, including capacity, form, essential validity or discharge (but excluding, perhaps, the legality of the contract²), are governed by the same principle, namely the doctrine of the proper law.

E. Multiplicity of the doctrine of the proper law. It should not be concluded from the use of the expression "proper law of the contract" or terminology such as whether the contract is a "French or an English contract"³ or whether the bill of exchange is an "English bill" or "French bill,"⁴ that *all* the incidents of a contract are necessarily governed by the same legal system. Nor should this conclusion be drawn from the universal application of the proper law doctrine which has just been discussed. The principle of the universal application of the proper law means merely that the same elastic rule has to be employed for ascertaining *all* contractual incidents, and it does not provide an answer to the question which we are now examining, namely whether the parties are at liberty to subject different aspects of the contract to different legal systems.

If we bear in mind that the doctrine of the proper law merely reflects in the contractual sphere the eminence conceded to the intention of the parties in the general law of contract, then it will seem to be merely the logical conclusion that the parties can subject parts of the contract to different legal systems.

Thus, if two Dutchmen conclude a contract of sale of goods in Paris in the French form stipulating that the vendor should deliver the goods to the purchaser's representatives in Chile, the parties may very well have intended the application of—

- (a) French law to the formal validity of the contract;
- (b) Dutch law to its essential validity (except performance) and
- (c) Chilean law to the performance of the stipulations therein.

The view that the parties can subject different parts of their agreement to different legal systems is supported by ample authority. Swinfen Eady, J., stated the rule in broad terms: ⁵ "Again, different laws may apply to different parts of a contract if the parties so intend." In *Chamberlain v. Napier*,⁶ Hall, V.C., remarked, with respect to a

¹ See p. 50, *ante*.

² See du Parc, L.J., in *Kleinwort Sons & Co. v. Ungarische Baumwolle*, (1939), 108 L.J. K.B. 861, 866. ³ Cheshire, 3rd ed., p. 312.

⁴ Pearson, J., in *Re Marseilles Extension Railway and Land Co.* (1885) 30 Ch. D. 598, 602.

⁵ In *British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 1 Ch. 354, 383. ⁶ (1880), 15 Ch. D. 614, 613.

marriage settlement, that "certain portions of the contract, namely those referring to English realty, were to be construed as an English contract, while in all other respects the agreement must be dealt with as Scottish."

The idea that different legal systems may govern different aspects of the contract has, in particular, found judicial recognition in the case of an obligation that is to be performed at a place other than that where the contract was concluded. In these cases, it is indeed usual for the performance of the obligation to be governed by the *lex solutionis* whilst the formation and construction of the contract is ascertained by a different law. Thus, Lord Roche observed in *R. v. International Trustee*¹—

But in English law a transaction may be regulated in general by the law of one country although as to parts of that transaction which are to be performed in another country the law of that country may be the law applicable.

Further, in *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, Lord Wright said²—

It is established that *prima facie*, whatever is the proper law of a contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract.

The operation of the theory of multiplicity of the proper law is in practice demonstrated by the facts in *Chatenay v. Brazilian Submarine Telegraph Co.*³

In this case, the Court of Appeal had to consider the proper law of an authority to buy and sell shares. The document was executed by a Brazilian national in the Portuguese language and addressed to a broker resident in London. The meaning of the words of the authority was not ascertained by the evidence of expert witnesses, and the Court had to assume that the authority might empower the broker to deal in these shares in different countries.

Lord Esher, M.R., had no hesitation in saying that if according to its language the authority meant that it could be acted upon in different countries, then the legal effect would be that the parties intended to submit every transaction to the legal system in whose jurisdiction the transaction was carried out.

¹ [1937] A.C. 500, 574.

² *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 151.

³ [1891] 1 Q.B. 79; see further Bowen, L.J., in *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B. 589, 600, 604; Herschell, L.C., in *Hamlyn & Co. v. Talisher Distillery*, [1894] A.C. 202, 207; Hanworth, M.R., in *Broken Hill Proprietary Co. v. Latham*, [1933] 1 Ch. 373, 397; Lord Wright in *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd.*, [1937] 4 All E.R. 206, 215.

The principle that the parties can subject different parts of the contract to different legal systems is fully recognised by writers such as Dicey,¹ and Professor Cheshire.²

The combined effect of the two rules of universality and multiplicity of the proper law leads to the following result : We are assisted in the determination of the proper law by presumptions of varying persuasive force. These presumptions may extend to contracts as entities (e.g. the presumption in favour of the *lex situs* in case of contracts relating to land) or they may be restricted in their application to particular incidents of the contract (e.g. the presumption that the capacity to conclude a mercantile contract or the form of such a contract are governed by the law of the place where the contract was concluded). Though the two presumptions which have just been mentioned by way of illustration are weighty, it must be insisted, on principle, that they are no less flexible than any other presumption designed to assist in the ascertainment of the proper law. Whether these presumptions are more or less easily displaced, whether they are applicable to all or to some contractual incidents, their intrinsic quality is the same. Their rebuttability is always a matter of degree, depending on the intention of the parties as gathered from the surrounding circumstances. Any attempt to deny their flexibility would render the doctrine of the proper law meaningless.

3. LIMITATIONS OF THE DOCTRINE OF THE PROPER LAW.

The intention of the parties governs all aspects of the contract ; it may provide for the application of different legal systems to different parts of the contract ; but it is subject to certain limitations designed, mainly, to prevent a misuse of the discretion conferred on the parties by the law.

When attempting to define the limitations of the doctrine of the proper law, it should be borne in mind, that in view of the dominant position occupied by the intention of the parties in the English law of contract, their liberty to choose the proper law must be wide, and that the same reluctance prevails here to restrict the liberty of contracting as can be observed in the internal sphere of the law of contract. The limitations of the doctrine of the proper law have been stated by the Privy Council³ in the following terms—

Where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention

¹ Dicey, Rule 161, sub-rule (3) ; note the words " especially as to the mode of performance."

² Cheshire, 3rd ed., p. 319.

³ *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277, 290.

to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.

Of the two bars to the exercise of the discretion of the parties mentioned in this statement the second needs no elaboration; for in all provinces of the conflict of laws the courts will refuse to give effect to a foreign legal rule incompatible with the public policy of the *lex fori*, and, since contracts not containing a foreign element can be avoided on the ground of public policy, those extending over several territorial jurisdictions can hardly be in a more favourable position. It is the first of these requirements which operates as a specific bar to the unlimited intention of the parties by providing that the parties must exercise their discretion *bona fide* and for a legal purpose. To appreciate the exact quality of this limitation, a distinction should be drawn between the choice of law and the consequences of the choice. The parties are free to designate any legal system as the one by which they desire their contract to be governed whether their contract has, in fact, a connection with that system or not, but once they have exercised their choice they must abide by it and accept its consequences whatever they are; "no one can maintain that persons who really contract under one law can by pretending that they are contracting under another law render valid an agreement which that law treats as void or voidable."¹ Nor is it impossible for the law to detect the true intention of the parties. If, having discovered that a particular provision was void under the intended law, the parties were to attempt to evade the consequences of their choice by claiming that that provision was subject to another legal system, their claim would, it is believed, not be considered as a *bona fide* expression of their intention. Thus, if a contract in restraint of trade concluded in England but to be performed in the country X (and being equally invalid under the laws of England and of X) were to contain a clause providing that the contract shall be governed by English law except with respect to its validity which shall be tested by the law of Ruritania (under which law the restraint would be valid), it is submitted that the parties have not acted *bona fide*—they would not be permitted to escape the result of their express choice by masquerading as an incident of the contract what is actually a consequence of their choice.²

Apart from the two bars just discussed, the liberty of the parties

¹ Dicey, 5th ed., p. 965, note 22.

² See the observations of du Parcq, L.J., in *Kleinwort Sons & Co. v. Ungarische Baumwolle* (1939), 108 L.J. K.B. 861, 866.

to elect the law applicable to their agreement is not restricted. It is, in particular, not required that the law intended by the parties should, in fact, have any connection with the surrounding circumstances of the case,¹ and nothing could, for example, prevent the two Dutchmen, on concluding in Paris a contract to be performed in Chile,² from electing English law as the proper law of the contract.

The failure to distinguish between the choice of the proper law and the consequences flowing from such a choice accounts for the assertion³ that, in the absence of an express intention of the parties, a presumption exists in favour of the law which renders effective an agreement that otherwise would be invalid. However, if such a presumption in favour of the most effective law really existed, it would lead to the strange result that the express intention of the parties to elect a law rendering an otherwise void contract valid, would have to be disregarded for want of *bona fides*, whilst the same intention, if merely implied, would be unimpeachable.

The so-called presumption in favour of the most effective law can certainly not be invoked if the contract reveals either an express intention of the parties to disregard the invalidity of the contract resulting from their choice of law⁴ or at least their indifference regarding the enforceability of their stipulations. Thus in *South African Breweries Ltd. v. King*,⁵ Kekewich, J., observed—

The reasonable conclusion is that they intended to make and accept the stipulation for what it was worth; and I cannot bring myself to think that under such circumstances, the judgment of the Court on the question whether the contract should be governed by English or other law depends on the possibility or even probability that the restrictive stipulation can be enforced in one event but not in the other.

Cases arise more frequently where the parties have not expressly disregarded the invalidity of their agreement under the intended law, but have never entertained any doubt that their agreement was valid

¹ *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277, disapproving of *The Torni*, [1932] P. 27. The advice of the P.C. in *The Vita Food* case has been criticised severely though, it is submitted, inconclusively by J. H. C. Morris and G. C. Cheshire in "The Proper Law of Contract in the Conflict of Laws," 56 *L.Q.R.* (1940) 320.

² P. 106, *ante*.

³ Dicta by Lord Herschell, L.J., and Lord Ashbourne in *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202, 208, 215; *per curiam* in *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo. (N.S.) 272; *per Fry, L.J.*, in *In re Missouri Steamship Co.* (1889), 42 Ch. 321, 341.

⁴ *Maritime Insurance Co. Ltd. v. Assecuranz Union von 1865* (1935), 52 Ll. L.R. 16.

⁵ [1899] 2 Ch. 173.

according to that law. Here again, it would be begging the question to argue from the effect of the choice of law to the choice itself. The "fallacious basis" of this argument was exposed by Lord Russell in *R. v. International Trustee* ¹—

It must be borne in mind that to ascertain what rights and obligations arose under a contract is a matter quite distinct from the enforcement of those rights and obligations when ascertained.

The result is that a presumption in favour of the most effective law, if such inference exists at all, can never surmount the limitations inherent in the proper law doctrine, namely that the choice must be *bona fide* and legal, and not in conflict with the general policy of the *lex fori*.

II. APPLICATION OF THE DOCTRINE OF THE PROPER LAW TO THE INCIDENTS OF CONTRACT

We shall now consider the application of the doctrine of the proper law to the incidents of the contract.

Our examination will extend to all kinds of contracts, including mercantile contracts, contracts of agency, contracts to sell or to mortgage land, marriage settlements and so on. However, the doctrine of the proper law applies to contracts only, and not to agreements which are not of a contractual character. To the latter group belong conveyances of land, gifts operating *in rem*, transfers of property in movables, or agreements (such as that of marriage) intended to create a status. The marriage agreement is sometimes—but not aptly—termed a "contract of marriage," and attempts have been made to treat it on the same basis as a simple contract. It is, however, useful to remember Lord Hannen's dictum that marriage is a status arising out of contract,² and to exclude this type of agreement from the present examination. The application of the proper law doctrine will thus be reserved to contracts in the proper sense which, according to Anson's definition, are agreements intended to create an obligation between the parties thereto.³

The contractual incidents which will be examined in turn are :

- (1) the capacity to contract :
- (2) the formal validity of the contract ; and
- (3) the essential validity of the contract.

¹ [1937] A.C. 500, 557.

² *Sottomayor v. De Barros* (1879), 5 P.D. at p. 101 ; see pp. 268, 291, *post*.

³ Anson, *Law of Contract*, 19th ed., 1945, p. 4.

L—(L.67)

1. CAPACITY.

The proper law governing the capacity of a person to conclude a contract is, in general, the law of the place where the contract was concluded.¹ The parties must be considered as having intended to submit, so far as capacity is concerned, to the *lex actus aut loci contractus*, and strong evidence will be required to rebut this presumption in a particular case.

Thus, in *Male v. Roberts*² the defendant, a minor according to English law, had contracted with one Cockburn for the supply of certain liquors. The contract was concluded in Edinburgh. The defendant had not paid his debt to Cockburn, and it was apprehended that the defendant might be arrested as a precaution against him leaving Scotland. Thereupon, the plaintiff came to the aid of the defendant by paying his debt to Cockburn. After their return to England, the plaintiff claimed to be refunded for the money spent to the defendant's use. The defendant relied on his minority.

Lord Eldon was clearly of opinion that the law of Scotland as the *lex loci contractus* applied, though he expressed this view in the procedural language then favoured: "It appears from the evidence in this cause, that the cause of action arose in Scotland; the contract must be therefore governed by the laws of that country where the contract arises."

This threw upon the plaintiff the burden of proving that, according to Scottish law, the contract was good, or, in other words, the defendant was regarded as having been of age. The plaintiff did not discharge this burden of proof which he might have done by calling experts on Scottish law. In the result, the rule of the English law of evidence was invoked that the foreign law is presumed to be the same as the English law unless the contrary is proved. Therefore the defence of minority prevailed.

The presumption that the capacity to contract is governed by the *lex loci contractus* is almost irrefutable in mercantile contracts. But the presumption retains the elastic nature characteristic of the conception of the proper law. It is, for example, rebuttable in some cases concerning contractual dealings in land and in marriage settlements. We shall discuss these cases later when examining the application of the proper law doctrine to special contracts.

2. FORM.

A. General observations. "The object of requiring a form is generally to secure evidence of the due conclusion of the transaction. It may, of course, have other purposes; it may be to secure that the

¹ Greene, M.R., *obiter*, in *Baindail v. Baindail*, [1946] P. 122, 128.

² (1800), 3 Esp. 163; this case is followed by the Scottish case *M'Feetridge v. Stewart & Lloyds Ltd.*, [1913] S.C. 773; see also the American cases *Thompson v. Ketcham* (1811), 8 Johns (N.Y.) 189 and *Ross v. Ross* (1880), 129 Mass. 243, 246.

transaction shall be entered into with due consideration and with full knowledge.”¹ These observations of Dr. Baty reveal the two purposes which may underlie the requirement of a form for a legal transaction, namely the evidential and the protective purpose. This distinction is of importance for the conflict of laws. A transaction must satisfy the *evidential* form prescribed by the *forum* where it is put in proof. With respect to the protective, or as it is usually termed, the *substantial* form, it is apparently sufficient if the transaction satisfies the *proper law*. We have, therefore, in every case first to examine the legal character of the form at issue. If the consequence of the neglect to observe the form is merely that the contract is unenforceable, the requirement of form is part of the law of evidence and consequently part of the law of the *forum* where the suit is brought. If, however, non-compliance with the form invalidates the contract, the form goes to the essence of the contract, and the contract must satisfy the form of the proper law, no matter in which *forum* proceedings have been taken.² Thus if a contract of service exceeding in time a year is concluded orally in France, and later an action for breach of the contract is brought in an English court, then according to French law (*lex loci contractus*) the contract is valid, while according to English law (*lex fori*) it is unenforceable for want of form satisfying the Statute of Frauds. As this form is of an evidential character, the contract cannot be enforced in the English courts though it is enforceable in the French courts and probably in the courts of other countries.³

We shall deal later with the evidential form when examining the conflictual rules applying to procedure.⁴ Here we have to consider the substantial form which, as we have seen, is governed by the proper law of the contract. The general rule is that the contract must comply with the formal requirements prescribed by the law of the place where the contract was concluded.⁵ The parties are presumed to have intended to submit to the formal requirements of essential nature prevailing at that place. This presumption has been called a “general canon of jurisprudence”⁶ on account of its universal recognition. It is almost as weighty as the presumption in favour of the *lex loci con-*

¹ Baty, *Polarised Law*, London, 1914, p. 44; Dicey, 5th ed., Rule 159, at p. 641.

² See Scrutton, L.J., in *Republica de Guatemala v. Nuñez*, [1927] 1 K.B. 669, 690.

³ *Leroux v. Brown* (1852), 12 C.B. 801.

⁴ See p. 363, *post*.

⁵ This means the place where the final acceptance of the offer was made; see p. 118, *post*.

⁶ Sir Knight Bruce, V.C., in *Guepratte v. Young* (1851), De G. & Sm. 217, 228.

tractus in the case of the capacity to conclude an ordinary mercantile contract.¹

An illustration of the rule, that the formal validity of a contract is governed by the *lex loci contractus*, is provided by the case of *Guepratte v. Young*.²

Mrs. A was entitled under a settlement made by her deceased husband B to exercise a power of appointment with respect to trust funds consisting of movables situate in England. There were three children of the marriage, viz., the son Joseph Augustus; a daughter who was married to M. Guepratte, an officer in the French Dragoons (who was domiciled in France); and a younger daughter Louisa Elizabeth. These three children (Mme. Guepratte with the concurrence of her husband) entered in England into a written agreement that the settled funds should be divided equally among them and that a different appointment by their mother should be disregarded.

This contract was valid according to English law (*lex loci contractus*) but apparently did not satisfy the French form (French law was the *lex domicilii* of Mme. Guepratte) which required the execution of so many original engrossments as there were parties to the contract.

Subsequently, Mrs. A exercised the power of appointment solely in favour of the son Joseph Augustus; he refused to adhere to the agreement among the three children. Thereupon M. and Mme. Guepratte petitioned the Court for specific performance of this agreement.

Sir James Knight Bruce, V.C., gave judgment in favour of the Gueprattes. The Vice-Chancellor based his decision on the ground that it is a universally recognised rule that the form of a contract is determined by the place where the contract is concluded, and that this is in particular so if the contract extends to movables situate in the territory of the *lex loci contractus*.

It is maintained by Dicey,³ Westlake⁴ and Foote⁵ that the formalities of a contract are governed by the *lex loci contractus* to the exclusion of other legal systems. This would be fatal to the view advanced here that the rule in question is merely a presumption—though a weighty one—for the ascertainment of the proper law. However, Dicey adds many exceptions⁶ to his principle, and quotes with approval Nelson's suggestion that a contract will be good if it conforms with the form required by the proper law though it might be void according to the *lex loci contractus*.⁷ Professor Cheshire strongly advocates a view compatible with the universal application

¹ See p. 112, *ante*.

² (1851), De G. & Sm. 217; *Re Marseilles Extension Railway & Land Co.*; *Smallpage's and Brandon's cases* (1885), 30 Ch. 598, 602; *Viditz v. O'Hagan*, [1899], 2 Ch. 569; [1900] 2 Ch. 89; *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79.

³ Rule 159, No. 2, p. 641 (5th ed.).

⁴ S. 209, at p. 295 (7th ed.).

⁵ At p. 388 (5th ed.).

⁶ See in particular exception No. 3, 5th ed., (p. 645).

⁷ H. Nelson, *Selected Cases, Statutes and Orders illustrative of the Principles of Private International Law*, 1889, London, pp. 257, 258.

of the doctrine of the proper law. He arrives at the conclusion that it is sufficient for the contract to satisfy the formal requirements of the proper law.¹ This contention is supported by *Van Grutten v. Digby*.²

In this case, a domiciled English lady, prior to her marriage to a domiciled Frenchman, executed in France a settlement which was good according to English law but did not comply with the French form and was, therefore, void under French law. The settlement related to personal estate situate in England.

Romilly, M.R., held that the contract was valid though not complying with the *lex loci contractus*. The Master of the Rolls expressed himself clearly in favour of the proper law: "The first consideration is whether the contract is French or English: whichever it may be, the law of that country must govern it. That does not mean the place merely where the contract was made. Englishmen when abroad may undoubtedly contract, and daily enter into contracts which are governed by the laws of this country."³

The thesis advocated here is, further, confirmed by the generally accepted view that the formalities of a contract relating to land are governed by the *lex situs*.⁴

The result is, therefore, that the substantial form of a contract is governed, like all incidents of the contract, by the proper law of the contract, and that there exists a strong, though not irrebuttable, presumption⁵ that the proper law governing that form is the *lex loci contractus*.

B. Consideration. The question whether the English doctrine of consideration which is foreign to most legal systems not based on the Common Law pertains to the form or to the substance of the contract, is of importance in its conflictual aspects.⁶ It came before the English courts in *In re Bonacina*.⁷

An Italian bankrupt had, after his discharge, acknowledged the amount of the old debt to one of his creditors who also was a domiciled Italian, and had promised to pay it off. The promise was given in Italy in the Italian form. The debtor died and the creditor tried to recover the debt against the debtor's estate situate in this country. According to English law, the acknowledgment was a *nudum pactum* because it was not sup-

¹ Cheshire, 3rd ed., p. 306.

² (1863), 32 L.J. Ch. 179.

³ At p. 181; the case is mostly based on considerations of equity; in *In re Hewitt & Hewitt* (1918), 43 Dom. L.R. 716, 720, a Canadian court held that the change of a beneficiary in a life insurance contract, which was done in a will, was valid if complying with the law of the place where the insurance company had its seat. A Missouri court decided in *Brotherhood of Railroad Trainmen v. Adams* (1928), 222 Mo. App. 689, 5 S.W. (2nd) 96 (quoted in 2 Beale, 1212-1213), that the form of the declaration changing the beneficiary of a life insurance policy depended purely on the intention of the parties.

⁴ See p. 127, *post*.

⁵ Dicey, 5th ed., p. 642, fn. c.

⁶ Cheshire, 3rd ed., p. 304.

⁷ [1912] 2 Ch. 394.

ported by consideration. According to Italian law, no consideration was required. The issue depended, therefore, on the question whether the requirement of consideration was of a procedural or essential character. If the former, the plaintiff could not rely on the acknowledgment in an English Court; if the latter the contract was enforceable here. The Court of Appeal took the latter view and gave judgment in favour of the plaintiff.

The view that the doctrine of consideration is of an essential character is in accordance with the decision of the House of Lords in *Rann v. Hughes*¹ overruling Lord Mansfield's famous dictum in *Pillans v. Van Mierop*.²

C. Stamp laws. The rules applicable to stamp laws are similar to those governing the form of the contract. One of the questions involved here is whether a foreign contract, that is not stamped in accordance with the *lex loci contractus*, can be relied upon in the English courts. Again, we have to analyse the consequences attached by the foreign stamp law to non-compliance with its provisions.³ The Act may ordain that a contract shall be *void* if not properly stamped; in which case the stamping requirement is of an essential character; and a contract not properly stamped would not be upheld in an English court.

Thus, in *Alvez v. Hodgson*,⁴ Lord Kenyon held that the plaintiff could not recover on a promissory note given in Jamaica which was void according to Jamaican law for non-compliance with the local stamp laws. Lord Kenyon rejected the argument that the English court would not take notice of foreign revenue laws⁵ because the contract in issue was rendered void by the foreign law. The Chief Justice admitted, however, a count on a *quantum meruit* which practically recompensed the plaintiff for his failure in the principal cause of action.

On the other hand, if the foreign stamp law renders the document merely *inadmissible in evidence*, the English courts will entertain an action founded on an unstamped foreign contract, because the statutory prohibition forms part of the foreign law of procedure which cannot be relied upon in the English courts.

In *Bristow v. Sequeville*,⁶ receipts of money paid in Cologne were *inadmissible in evidence* in the courts of Prussia for want of stamping. Nevertheless, the receipts were admitted as evidence in the English court, because the Prussian stamp law had only evidential character and did not invalidate the contract.

¹ (1778), 7 T.R. 350.

² (1765), 3 Burr. 1664 and Finch Sel. Cas. 269.

³ See Scrutton, L.J., in *Republca de Guatemala v. Nuñez*, [1927] 1 K.B. 669, 690.

⁴ (1797), 7 T.R. 241; *Clegg v. Levy* (1812), 3 Camp. 166.

⁵ See p. 53, *ante*.

⁶ (1850), 5 Exch. 275.

The general provisions of the English Stamp Act, 1891, are of evidential character only. In consequence, foreign contracts, which are tendered in evidence in an English court, must be stamped in accordance with the Stamp Act. If, for example, an English underwriter has concluded a re-insurance treaty with a foreign company, it would appear that policies issued under this treaty must be stamped¹ according to the English Stamp Act no matter whether the proper law of the insurance contract is English or foreign law. If, however, a contract of marine insurance is in issue, the special provision of Sect. 93 (1) of the Stamp Act, 1891, applies, according to which no contract of marine insurance is valid unless expressed in an insurance policy, i.e. in writing; in this case non-compliance with the section vitiates the contract and it is, therefore, necessary to ascertain whether the proper law of the contract is English law (of which this provision of the Act forms part) or foreign law. In the latter case the contract would be valid though not embodied in a written document.²

3. ESSENTIAL VALIDITY.

“Under the term ‘essentials’ may be classed generally everything which does not come under the description of forms.”³ The law governing the essential validity of the contract has, therefore, to be invoked in questions concerning the creation of an obligation, the construction or interpretation of the contract, the quality and effect of the rights and duties arising under the contract, and further the legality and discharge⁴ of the obligation.

In the province of the essential validity of the contract, the proper law doctrine finds its clearest expression.

A. General observations. The two general presumptions designed to assist in the determination of the intention of the parties with respect to the law governing the essential validity of the contract are the presumption in favour of the *lex loci contractus* and that in favour of the *lex loci solutionis*. The former comes into operation if the place of the conclusion of the contract coincides with the place where the contract is to be performed. “The broad rule is that the law of a country where a contract is made presumably governs the

¹ S. 95, No. 2; *Royal Exchange Assurance Corporation v. Sjöforsakrings Aktiebolaget Vega*, [1902] 2 K.B. 384, 393.

² *Maritime Insurance Co. Ltd. v. Assecuranz Union von 1865* (1935), 52 Ll. L.R. 16.

³ Foote, 5th ed., p. 415.

⁴ The provisions of the Law Reform (Frustrated Contracts) Act, 1943, apply only if the discharge of the contract is governed by English Law.

nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties.”¹ The presumption in favour of the law of the place where the contract is concluded is sometimes considered as the “principal presumption”² for the ascertainment of the proper law.³ If the place where the contract is to be performed differs from the place where it is concluded, a strong presumption exists in favour of the *lex solutionis*.⁴ The presumption in favour of the law of the place of performance will, generally, cover only the part of the contract pertaining to performance; the circumstances may, however, reveal the intention of the parties to subject the whole contract to that law.⁵ The operation of these two presumptions has been described by Lord Esher in *Chatenay v. Brazilian Submarine Telegraph Co.*⁶—

If a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the laws of that country.

If a contract is not concluded between parties present at the same place, it is sometimes not easy to define exactly the place where the contract was concluded. For instance, if *A* in London offers goods to *B* in Paris by letter or telegraph, and *B* accepts the offer by letter, it may be doubtful whether Paris or London is the place where “the final acceptance” of the contract is perfected.⁷ This is the place where the last condition was discharged which was requisite for transforming the transaction from tentative negotiations into an actionable legal obligation.⁷ In our example, Paris would be considered as the *locus contractus*.

¹ Per Bowen, L.J., in *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589, 600; referred to in *British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 1 Ch. 354, 381. ² Bowen, L.J., *loc. cit.*, at p. 602.

³ Willes, J., in *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115, 122; Chitty, J., in *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321, 326.

⁴ Willes, J., *loc. cit.*, at p. 122; see p. 119, *post*.

⁵ *R. v. International Trustee*, [1937] A.C. 500, 554; in this case, the *lex loci contractus* and the *lex loci solutionis* were identical.

⁶ [1891] 1 Q.B. 79, 82.

⁷ *Benaim & Co. v. Debono*, [1924] A.C. 514, 520; see Goodrich, *Conflict of Laws* (1927), s. 104, at p. 218.

B. Presumption in favour of *lex loci contractus*. The operation of the presumption in favour of the *lex loci contractus* will be illustrated by two leading cases, namely *P. & O. Steam Navigation Co. v. Shand*,¹ and *Jacobs v. Crédit Lyonnais*.²

In *P. & O. Steam Navigation Co. v. Shand*, the Hon. Farquhar Shand had purchased a ticket from the steamship company in England for the carriage of his person and his baggage from Southampton to Mauritius. In those days before the completion of the Suez Canal, the course of the voyage was that the passengers and their baggage were carried in the company's ships from Southampton to Alexandria, thence by railway to Suez, thence to a small steamboat to another of the company's steamers waiting for them in the Red Sea and carrying them to the port of destination. During the voyage, part of Mr. Shand's baggage was lost. He claimed damages for this loss.

Among the conditions endorsed on the company's ticket which the plaintiff had signed was one excluding liability for loss of baggage. According to French law which prevailed in Mauritius, this clause was invalid as infringing public policy. According to English law, the clause was good.

The Court had the choice between the following systems: English law as the *lex loci contractus*, French law as that of the place of performance and Egyptian law since the goods were apparently lost on the railway route.

The Privy Council analysed the intention of the parties in accordance with the rules explained earlier and advised that English law, as the law of the place where the contract had been concluded, was the proper law of the contract of carriage.

In *Jacobs v. Crédit Lyonnais*, the plaintiffs who were London merchants, had purchased from the defendants who were a banking firm in London, a quantity of Algerian esparto stapled in Algeria. The esparto was to be shipped from the Algerian port to England by a French company as agents for the plaintiffs in a vessel chartered by the plaintiffs.

After the conclusion of the contract, an insurrection broke out in Algeria. This event and the military operations following it rendered impossible the exportation of the esparto and the plaintiffs claimed damages from the defendants for non-delivery of the esparto. According to French law, which prevailed in Algeria, the events in question amounted to an act of *force majeure* and provided an excuse for the defendants. According to English law, impossibility of performance was no defence.

The Court of Appeal gave judgment in favour of the plaintiffs holding that, according to the presumed intention of the parties, the proper law of the contract was English law because the contract was concluded in London.

C. Presumption in favour of *lex solutionis*. As regards the presumption in favour of the law of performance, we have already commented on the modern tendency of the English conflict of laws to apply this presumption to that part of the contract which deals with the discharge of the contract, whilst considering the creation and extent of the obligation as subject to the law of the place where the

¹ (1865), 3 Moo. P.C. (N.S.) 272.

² (1884), 12 Q.B.D. 589.

contract was concluded. Among the numerous cases where the presumption in favour of the *lex solutionis* has been applied,¹ *Benaïm & Co. v. Debono*² : may be mentioned.

The plaintiff, a merchant in Malta, had bought a quantity of anchovies from the defendants who carried on business in Gibraltar. The defendants' offer had finally been accepted in Malta. The anchovies were purchased f.o.b. Gibraltar. The goods were paid for and shipped to Malta.

The plaintiff objected to the quality of the anchovies but did not return them to the sellers. He delivered them to his customers to whom he had already re-sold them, and contented himself with claiming a reduction of the purchase price. Later the plaintiff changed his mind because his customers refused to accept the anchovies. He then claimed rescission of the contract and repayment of the purchase money.

His claim depended on the law governing the contract. If it was the law of Malta (*lex loci contractus*), the plaintiff had retained his right to rescind the contract; whereas under the law of Gibraltar (*lex solutionis*), the plaintiff was considered as having forfeited the right to rescission because he had acted in a way inconsistent with the ownership of the defendants (the original sellers).

The Judicial Committee advised against the plaintiff because in pursuance of the f.o.b. clause the goods were delivered to him in Gibraltar. "It appears to their Lordships to be plain upon the face of the documents that the contract was to be performed by the delivery of the goods on board ship at Gibraltar selected by the respondent (plaintiff)."

Another case decided on the basis of the *lex solutionis* is *Chatenay v. Brazilian Submarine Telegraph Co.*³

The discretion of the parties to subject the obligation and the performance of a contract to different legal systems is of particular importance in the case of loans or other money claims which are to be discharged in foreign currency. If, according to the agreement of the parties, the obligation has to be discharged in a foreign currency, the performance of that obligation is subjected to all contingencies which may befall the foreign currency, for "an essential element in the foreign law of the place of performance, when the performance is the payment of money, is the law of currency or legal tender governing in that place."⁴ The debt can in these cases be discharged

¹ *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79; *Benaïm & Co. v. Debono*, [1924] A.C. 514; *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321 (subsidiary to the law of the flag); *Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd.*, [1934] A.C. 122, overruling *Broken Hill Proprietary Co. Ltd. v. Latham*, [1933] 1 Ch. 373; *Ralli Brothers v. Compañía Naviera Soto y Aznar*, [1920] 1 K.B. 614; *R. v. International Trustee*, [1937] A.C. 500 (in this case New York was both the place where the contract was concluded and where it was to be performed because the suppliants had exercised the New York option); *In re Francke & Rasch*, [1918] 1 Ch. 470.

² [1924] A.C. 514.

³ [1891] 1 Q.B. 79; ante at p. 107.

⁴ *Per Lord Wright in Adelaide Electricity Supply Co. v. Prudential Assurance Co. Ltd.*, [1934] A.C. 122, 151. *Pymont Ltd. v. Schott*, [1939] A.C. 145.

in whatever is the legal tender at the place of performance at the time of the maturing of the debt. If the foreign currency is then depreciated in comparison with the rate of exchange prevailing at the time when the debt was stipulated, the creditor will suffer heavy loss and his claim may even become worthless (as happened in the case of debts stipulated in the Imperial Russian ¹ and the former German ² currency). It is obvious that this result is detrimental to international credit operations and the investment of money abroad, inasmuch as these loans are often redeemable only after a great number of years.

From the experience of the monetary depreciation during the Civil War in the United States, there arose the practice of protecting obligations against any instability of the currency by means of the so-called gold clause. Among the different types of the gold clause,³ the gold value clause, also called the gold clause of the *Feist*-construction⁴ has achieved universal recognition. Thereby the parties agree that the substance of the debt shall be severed from the medium of payment and fixed for all times by reference to the value of gold. The creditor's claim is thus made independent of the fluctuations of the currency of payment, and the currency laws in force at the place of performance apply only to the medium of discharge⁵ but not to the substance of the debt. The gold value clause may, however, be defeated by the provisions of the proper law, e.g. by an express enactment of that law invalidating these protective devices.⁶

D. Other cases. The elastic nature of the two general presumptions which have just been considered is demonstrated in a number of cases where the courts attributed decisive weight to factors other than the *locus contractus* or the *locus solutionis*. The insertion of an arbitration clause in a contract permits, for instance, of the inference

¹ *British Bank for Foreign Trade Ltd. v. Russian Commercial & Industrial Bank* (1921), 38 T.L.R. 65.

² *Anderson v. Equitable Life Assurance Society of the United States* (1926), 42 T.L.R. 302, 123; *In re Chesterman's Trust*, [1923] 2 Ch. 466; *Romer, L.J.*, in *Broken Hill Proprietary Co. v. Latham*, [1933] 1 Ch. 373, 408.

³ Lord Wright, "Gold Clauses," in *Legal Essays and Addresses*, 1939, p. 147; M. Schmitthoff, "The Gold Clause in International Loans" in *Journal of Comparative Legislation*, 1936, Vol. 18 (3rd Ser.), p. 266; A. Plesch, *The Gold Clause*, Vols. 1 and 2, London, 1936.

⁴ After the interpretation adopted by the House of Lords in *Feist v. Société Intercommunale Belge d'Electricité*, [1934] A.C. 161.

⁵ Judgment of the Permanent Court of International Justice sitting at the Hague in the case of the Serbian and Brazilian Loans, *Publications of the Permanent Court A.C. Nos. 20, 21*; *Feist v. Société Intercommunale Belge d'Electricité*, [1934] A.C. 161; *R. v. International Trustee*, [1937] A.C. 500. *New Brunswick Railway Co. v. British & French Trust Corporation*, [1939] A.C. 1; *Apostolic Throne of St. Jacob v. Saba Eff Said*, [1940] 1 All E.R. 54.

⁶ See Lord Russell in *R. v. International Trustee*, *supra*, at p. 561.

that the parties intended that the law of the place of the stipulated arbitration should govern the contract. Thus, Goddard, J., said in *Maritime Insurance Co. Ltd. v. Assecuranz Union von 1865*¹—

I think that the words used in this arbitration clause really mean that the parties intend that they should be equivalent to a clause which one finds in contracts saying that the English court should have jurisdiction.

4. ILLEGALITY.

Among the incidents which have been classified under the term of "essential validity," the illegality of the contract requires additional examination. Many countries, including Great Britain, have introduced restrictions on the exportation of foreign exchange and on transactions connected therewith,² and contracts infringing such restrictions are usually illegal by the law imposing those restrictions.

The Bretton Woods Agreements which have the force of law in the United Kingdom,³ provide that—

exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member . . .

Notwithstanding this provision, the question whether a contract illegal by a foreign currency law can be enforced in the English courts cannot be answered in a general manner; the answer depends on the wider question whether the foreign law prescribing the illegality governs the contract under examination or essential parts of it, e.g. its performance. If the foreign currency law is part of the proper law of the contract, of the *lex loci solutionis*,⁴ or perhaps the *lex loci contractus*, the contract is unenforceable in the English courts, but if it pertains only to the personal law of one of the contracting parties,⁵ the contract is not rendered unenforceable.

A. Where the contract is illegal according to the proper law. On principle, it is plain that a contract, which is illegal according to the

¹ (1935), 52 Ll. L.R. 16; *Hamlyn & Co. v. Talisher Distillery*, [1894] A.C. 202; *Spurrier v. La Cloche*, [1902] A.C. 446.

² Exchange Control Act, 1947, and Statutory Rules and Orders made thereunder. Contracts infringing the English exchange control regulations are, in principle, illegal in English law.

³ Bretton Woods Agreements Act, 1945; Bretton Woods Agreements Order, 1946 (S.R. & O., 1946, No. 36), Sched., Art. VIII, sect. 2(b).

⁴ *Frankman v. Anglo-Prague Bank* [1948] 1 All E.R. 339; see also *Kahler v. Midland Bank, Ltd.*, [1948] 1 All E.R. 811. In *Boissevain v. Weil*, [1948] 1 All E.R. 893, the contract did not contravene any exchange regulations.

⁵ *Kleinwort Sons & Co. v. Ungarische Baumwolle* (1939), 108 L.J. K.B. 861.

proper law, is not recognised as valid by the English system of conflict of laws.¹

Thus, in *Heriz v. Riera*,² a Spaniard residing in Spain contracted with the Spanish Government for the supply of tobacco for the governmental factories in Spain. The contractor had promised a share in the deal to another Spaniard described as Chief Treasurer of the Kingdom of Spain and a civil servant. After the latter's death, his administrators claimed an account from the contractor and asked further for payment of the deceased's share in the deal. The defence was that the promise to share the profits with a civil servant was illegal according to Spanish law. Sir L. Shadwell, V.C., allowed this defence.

B. Where the contract is illegal according to the *lex loci solutionis*.

The English courts will not enforce a "contract where performance of that contract is forbidden by the law of the place where it must be performed."³ This rule applies even if the illegality is provided by foreign enactments having the character of revenue or trade laws proper. Thus contracts contravening the foreign exchange regulations⁴ of a friendly state or aiming at or assisting in smuggling⁵ goods into its territory have been considered as unenforceable in the English courts.

If the proper law of the contract is the *lex loci contractus* (or a third system of law) and the part relating to performance is governed by the *lex loci solutionis*, the question may arise whether illegality prevailing at the place of the performance—and invalidating, of course, this part of the contract—destroys the whole agreement. The answer has to be deduced from the principles of the general law of contracts and particularly from the rule in *Waugh v. Morris*.⁶ If the parties have provided only one mode of performance, which is or has become illegal, the invalidity of this performance taints the whole contract.⁷ An example of this rule is provided by *Ralli Bros. v. Compañía Naviera Soto y Aznar*⁸—

In this case, the charterers, an English firm, had contracted with the shipowners, a Spanish firm, for the carrying of a consignment of jute

¹ *Heriz v. Riera* (1840), 11 Sim. 318; *Ford v. Cotesworth* (1870), L.R. 5 Q.B. 544; *De Beêche v. The South American Stores*, [1935] A.C. 148.

² (1840), 11 Sim. 318.

³ Lord Wright, M.R., in *International Trustees v. R.*, [1936] 3 All E.R. 407; Lord Wright, *Legal Essays and Addresses*, 1939, p. 173.

⁴ *Frankman v. Anglo-Prague Bank*, [1948] 1 All E.R. 339; *Kahler v. Midland Bank, Ltd.*, [1948] 1 All E.R. 811 (where the rule was extended to a claim in detinue for delivery of share certificates).

⁵ *Foster v. Driscoll*, [1929] 1 K.B. 470. It should, however, be remembered that the English Courts will refuse the enforcement of the foreign revenue or trade laws as such, for they will not act as collectors of taxes for the benefit of foreign states; see p. 53, *ante*.

⁶ (1873), L.R. 8 Q.B. 202.

⁷ *Ralli Bros. v. Compañía Naviera Soto y Aznar*, [1920] 1 K.B. 614; *De Beêche v. South American Stores Ltd.*, [1935] A.C. 148; *Foster v. Driscoll*, [1929] 1 K.B. 470; *Kursell v. Timber Operators & Contractors*, [1927] 1 K.B. 298, 313.

⁸ [1920] 1 K.B. 614.

from India to Barcelona. The freight was payable at Barcelona in pesetas. Subsequent to the conclusion of the contract, the Spanish Government promulgated an order that the freight on jute to Spain should not exceed a fixed sum which was less than the agreed freight. The issue was whether the shipowners were entitled to the agreed higher or the prescribed lower freight.

Bailhache, J., gave judgment in favour of the charterers, holding that, though the proper law of the contract was English law, "it would be equally illegal for the owners to demand or receive, as for the charterers to pay in Spain a freight in excess of the legal limit."

If, on the other hand, the contract provides for two ways of performance, "one legal the other illegal, it is not avoided unless there is an *intention* to perform it in the illegal way."¹ In the absence of such intention, the illegal mode of performance would not vitiate the second alternative and the terms of the contract pertaining to the obligation; the contract has then to be discharged in the legal way of performance.

C. Where the contract is illegal according to the *lex loci contractus*.

It may happen that a contract is concluded in one country but that the parties intend the contract to be regulated by the law of another country. The contract may be illegal according to the law of the place where it has been concluded, but lawful according to the law intended by the parties. Does the illegality prevailing at the *locus contractus* invalidate the whole agreement?

On principle, the answer should be that, if *any* incident of the contract is governed by the *lex loci contractus* (e.g. the capacity of the parties to conclude the contract, or the form or essential validity of the contract), and if, further, that particular incident is declared illegal by the *lex loci contractus*, then the whole agreement is tainted by the partial illegality. On the other hand, if the *lex loci contractus* extends to no incident of the contract at all, but is merely the accidental place where the agreement was concluded, there would be no reason why the illegality prevailing at the place of conclusion should invalidate the contract. Likewise, if the illegality by the *lex loci contractus* does not extend to an incident governed by that law, but e.g. to the performance of the agreement (which is governed by another law, viz. the *lex solutionis*), the validity of the contract would not be affected.

Dicey² expresses this principle in the following statement—

A contract (whether lawful by its proper law or not) is invalid if the making thereof is unlawful by the law of the country where it is made (*lex loci contractus*).

But he qualifies this statement by adding that this rule does not apply to the numerous class of cases "where it is not the *making* of a contract, but the *performance* thereof in a given country which is illegal."

¹ *Per* Scrutton, L.J., in *Central India Mining Co. v. Soci  t   Coloniale*, [1920] 1 K.B. at p. 771.

² Dicey, 5th ed., p. 656.

It should, however, be observed that no conclusive judicial authority can be quoted in support of the view expounded.¹ A dictum of Lord Halsbury, L.C., in *Re Missouri Steamship Company*² intimates that invalidity prevailing at the place where the contract is concluded invalidates the whole agreement in any case, but that dictum has been restrictively interpreted in *Vita Food Products Inc. v. Unus Shipping Co.*,³ where it is said—

The exact scope of Lord Halsbury's proviso has not been defined. There may also be questions in some cases as to the effect of non-performance of conditions which by the foreign law of the place where a contract was entered into are essential to its formation, though even in that case the validity of the contract may depend on its proper law.

It should be added that these observations refer only to the case of a contract which is *illegal* according to the *lex loci contractus*. If this legal system considers the contract merely as *void*, the obligation would not be affected because the validity of the contract—as contrasted with the illegality—is exclusively determined by the proper law of the contract.⁴

D. Where the contract is illegal according to the *lex fori*. A contract may be invalid because it infringes the public policy of the *lex fori*. The *lex fori* refuses, as we have seen,⁵ to admit a foreign right, though duly acquired under the *lex causae*, if it encroaches upon the public policy prevailing at the *forum*. In consequence, any infringement of the public policy of the *lex fori* renders the foreign contract unenforceable though it might be valid according to its proper law.⁶

Here again, where the foreign contract is merely *void* and not *illegal* by the *lex fori*, an action based upon the contract is admitted in the *forum*; thus, money lent in Monte Carlo (where gaming contracts are valid) for the purpose of gaming there, is recoverable in the English jurisdiction⁷ (where such a loan would be void).

III. PARTICULAR CONTRACTS

The courts have further evolved a number of presumptions applicable only to particular sets of facts. These special presumptions are

¹ In *Graumann v. Treitel*, [1940] 2 All E.R. 188, 195, it was held in point of fact that performance in England was not unlawful by German currency law.

² (1889), 42 Ch. D. 321, 336.

³ [1939] A.C. 277, 298.

⁴ In *re Missouri Steamship Co.* (1889), 42 Ch. D. 321; *Jones v. Oceanic Steam Navigation Co. Ltd.*, [1924] 2 K.B. 730.

⁵ See p. 50, *ante*.

⁶ *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277, 292, 296, and the American case *Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.* (1889), 129 U.S. 397.

⁷ *Saxby v. Fulton*, [1909] 2 K.B. 208, 211.

of different weight, but they all have this feature in common that they are not of a conclusive character.

The most important among these special presumptions are the presumption in favour of the law of the flag, in the case of contracts connected with maritime transport; that in favour of the *lex situs* in contracts relating to the title and possession of land; and (apparently) that in favour of the law of matrimonial domicile¹ in the case of contracts concluded in consideration of marriage (marriage settlements).

1. MARITIME CONTRACTS.

The English courts early evolved the presumption that the parties to a contract of carriage by sea have presumably intended to submit their agreement to the law of the flag which the ship carried. This presumption was of practical advantage when the issue was whether the master of the ship could hypothecate the ship and the cargo during the voyage in case of necessity; but it was from the beginning doubtful whether the presumption carried much weight as far as the relation between shipowner and charterer was concerned.

The presumption in favour of the law of the flag was discussed in *Lloyd v. Guibert*.²

In this case, the plaintiff, a British subject, chartered a French ship from the French shipowners (defendants) for a voyage from Haiti to a French or English port at the plaintiff's option. The ship was then berthed at a Danish West India port. On her voyage, the ship suffered damage and put into a Portuguese port. There the master borrowed money on a bottomry bond of ship, freight and cargo. With the borrowed money, the ship was repaired and proceeded to Liverpool.

Later the lender instituted proceedings in the English Court of Admiralty for the payment of his loan. The plaintiff as owner of the cargo had to pay him, because the ship and freight proved insufficient. The plaintiff then tried to obtain an indemnity from the defendants as shipowners but they abandoned ship and freight and were according to French law thereby released from any liability towards the plaintiff. No right of abandonment was recognised by the other legal systems contending with French law for application to the contract, namely Danish, Haitian, English and Portuguese law.

Willes, J., after pointing to the general principle that the proper law has to be ascertained on the basis of the intention of the parties, laid down the "general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents the law of the ship should govern."³

The result was that French law applied and that the defendants were released upon exercising their right of abandonment.

¹ See p. 295, *post*.

² (1865), L.R. 1 Q.B. 115; see further in favour of the law of the flag: *The Gaetano & Maria* (1882), 7 P.D. 137; *Droege v. Snart*; *The "Karnak"* (1869), L.R. 2 P.C. 505; *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321, *per* Chitty, J., at p. 329.

³ *Per* Willes, J., at p. 129.

The elastic character of the presumption in favour of the law of the flag is evidenced by a number of decisions¹ in which the courts came to the result that the parties had intended a different legal system for the contract. The courts attributed particular weight to the form which the contract of affreightment assumed. In the case of an English company chartering a foreign ship by means of a typical English charter-party, the courts have repeatedly decided that the presumption in question was overthrown in favour of English law.² Prof. Cheshire³ observes rightly that the presumption in favour of the law of the flag is of diminishing importance in consequence of the tendency to unify the law of charterparties⁴ and bills of lading;⁵ often the clauses in the bill of lading, and in particular the so-called "clause paramount,"⁶ provide a clue to the proper law of the contract.⁷ Moreover, the presumption was never applicable to all aspects of maritime transport, as was explained by Lord Esher in *The Industrie*⁸ and Lord Merrivale in *The Njegos*.⁹ Lord Merrivale said—

It seems quite plain that, in connection with such contracts as the master may be driven to make by necessity in the course of the voyage, the law of the flag should prevail, for it is that law which governs his relations with his owners; but that, as is pointed out by Lord Esher, is by no means inconsistent with the proper law of the contract of affreightment being a different law. . . . In my opinion all these cases show very clearly that as regards the contract of affreightment as a whole, there is no necessary presumption that the law of the flag applies.

2. CONTRACTS RELATING TO LAND.

In transactions relating to land¹⁰ it is important to distinguish between the *contract* whereby a person promises to transfer, mortgage, etc. land and the actual *conveyance* whereby this promise is implemented. The contract operates *in personam*, the conveyance *in rem*. Often contract and conveyance form part of the same transaction and are not easily distinguishable. Yet, the distinction is essential for the

¹ *Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co.* (1883), 10 Q.B.D. 521; *The Industrie*, [1894] P. 58; *The Adriatic*, [1931] P. 241; *The Njegos*, [1936] P. 90.

² *Akhtselkab August Freuchen v. Steen Hansen and others* (1919), 1 Ll. L.R. 393; and the cases quoted in the preceding footnote.

³ Cheshire, 1st ed., p. 196.

⁴ Greer, J., in *Akhtselkab August Freuchen v. Steen Hansen and others* (1919), 1 Ll. L.R. 393, 396.

⁵ See The Brussels Rules of 1923, which are embodied in The Carriage of Goods by Sea Act, 1924.

⁶ On the "clause paramount" see C. M. Schmitthoff, *The Export Trade*, 1948, at p. 241.

⁷ *Kadel Chajkin Ltd. v. Mitchell Cotts & Co.*, (1948), 64 T.L.R. 89.

⁸ [1894] P. 58, 76.

⁹ [1936] P. 90.

¹⁰ See pp. 159, 176, *post*; and Dicey, 5th ed., note 20; "Law governing contracts with regard to immovables," at p. 953.

appreciation of the conflictual rules. It is a universally recognised maxim of the conflict of laws that the *conveyance* must satisfy in all respects the law of the country where the land is situate. The position of a *contract* relating to land is different; on principle, there is no reason why this contract should not be governed by the proper law as all other kinds of contract. Story's view, that the contract must conform with the law of the country where the land is situate,¹ is not supported by the English authorities and does not represent the modern American view.² Dicey,³ Westlake,⁴ and Professor Cheshire⁵ agree that a contract relating to land should on principle be governed by the ordinary law of contract (proper law) and not by that of the conveyance (*lex situs*).

Another question is whether, in the case of a contract relating to land, there exists a special presumption which will assist us in ascertaining the intention of the parties. Such a *prima facie* inference is drawn by Dicey: "The proper law of such contract is, in general, though not necessarily, the law of the country where the immovable is situate." Story's view differs from the modern view in the quality attached to the *lex situs*. Story's rule would have absolute effect, whilst a presumption in favour of that law would be rebuttable.

The theory that all incidents of a contract relating to land (whether capacity, form or essential validity) are governed by the proper law of the contract which is *prima facie* the *lex situs*,⁶ is supported by judicial authority.⁷ Here again, however, the weight of the presumption varies according to the incident in question. It is almost conclusive in case of capacity;⁸ it is more easily rebuttable in questions of form,⁹ or essential validity.¹⁰

The *lex situs* guided the court in *Bank of Africa Ltd. v. Cohen*,¹¹ a

¹ Story, 8th ed. (Bigelow), 1883, s. 373 f., pp. 530-1.

² Which is in favour of the *lex loci contractus*, 2 Beale, 1216.

³ Dicey, 5th ed., p. 422.

⁴ Westlake, 7th ed., s. 216, p. 309.

⁵ Cheshire, 3rd ed., pp. 724-7.

⁶ Dicey, 5th ed., p. 422, n. 1.

⁷ Lord Atkin in *R. v. International Trustee*, [1937] A.C. 500, 529; Willes, J., in *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115, 129; Swinfen Eady, J., in *British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 1 Ch. 354, 383.

⁸ *Bank of Africa Ltd. v. Cohen*, [1909] 2 Ch. 129.

⁹ *In Re Smith; Lawrence v. Kitson*, [1916] 2 Ch. 206.

¹⁰ *British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 2 Ch. 514; *Cambell v. Dent* (1838), Moo. P.C. 292; *Good v. Good* (1864), 33 L.J. Ch. 273.

¹¹ [1909] 2 Ch. 129. It should, however, be noted that the decision of Eve, J., as well as of the Court of Appeal (Buckley, L.J., Kennedy, L.J., Cozens-Hardy, M.R.) was not based on a *presumption* in favour of the *lex situs*, but on the assumption that the *lex situs* governs the capacity to conclude a contract relating to land in any case. This reasoning was apparently prompted by the unobjectionable consideration that the court will not order specific performance of such a contract if this performance would violate the *lex situs*. There was, however, in issue an alternative count for damages (see *per* Buckley, L.J., at p. 143).

case concerned with the capacity of a person who had agreed to grant a mortgage of land. The facts of the case were as follows—

The plaintiffs, a banking firm, had a claim for debt against one L. W. Cohen. The defendant, who was the wife of the debtor, agreed to mortgage certain land belonging to her and situate at Johannesburg as a security for her husband's debt.

The contract was concluded in London. It provided, *inter alia*, that the defendant renounced and abandoned the benefit of all rights whatsoever which Roman-Dutch law (which prevailed at Johannesburg) provided in her interest. Roman-Dutch law incorporates in its system the *senatus consultum Veilleianum* and the *Authentica "si qua mulier."* According to these enactments a married woman is incapable of acting as surety for her husband unless she has *specifically* renounced the benefits of these enactments. The *general* renunciation expressed in the contract was not sufficient according to Roman-Dutch law.

The plaintiffs asked primarily for specific performance. The defendant relied on her incapacity under Roman-Dutch law. The issue was, therefore, whether the capacity to conclude the contract was governed by the *lex loci contractus* (English law) or the *lex situs* of the land in question (Roman-Dutch law).

Eve, J., and the Court of Appeal gave judgment in favour of the defendant. Eve, J., said: "The Court in dealing with a contract relating to immovables is bound to determine this question of capacity by the *lex situs*, and if the *lex situs* shows that the contracting party had not the capacity to contract, the whole contract is void and nothing can be done in this country to enforce that contract against the contracting party."

The limits of the presumption in favour of the *lex situs* were exhaustively discussed in *British South Africa Co. v. De Beers Consolidated Mines Ltd.*¹ In this case—

The British South Africa Co., an English Chartered Company (the plaintiffs), had borrowed money from the defendants, a company registered at Kimberley in Cape Colony. The contract of loan provided that in "consideration of this assistance" the plaintiffs promised to grant the defendants an exclusive mining licence for all diamondiferous ground in the vast territory controlled by them. The plaintiffs paid off the loan, and later a dispute arose with respect to the exclusive mining licence.

The plaintiffs considered this licence as being in the nature of an equitable charge designed to secure the loan. The plaintiffs argued that the agreement had to be construed according to English law and that it was, after the redemption of the loan, void as a clog on the equity of redemption. The defendant's answer was that the contract was governed by Roman-Dutch law; that no rule prohibiting a clog on the equity of redemption was known to that legal system; and that, in consequence, the exclusive mining licence continued to be valid after the redemption of the loan.

The validity of the licence depended, therefore, on whether the agreement was governed by the proper law (English law) or by the *lex situs* of the property (Roman-Dutch law).

Swinfen Eady, J., and the Court of Appeal (Cozens-Hardy, M.R.,

¹ [1910] 1 Ch. 354; [1910] 2 Ch. 502.

Farwell, L.J., Kennedy, L.J.) arrived at the result that the contract was governed by English law. Cozens-Hardy, M.R., said: "In my opinion the contract did not create any more than a personal right, as distinct from a real right, a right which the courts of this country would enforce *in personam*. . . . In my opinion an English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the *lex situs*, is a contract to give a mortgage which, *inter partes*, is to be treated as an English mortgage and subject to such rights of redemption and such equities as the law of England regards as necessarily incident to a mortgage." Kennedy, L.J., observed: "If it is apparent that the contract affects movables situated out of the jurisdiction, the *lex loci rei sitae*, in general at least, must be taken as the proper law of the contract. . . . But whilst I believe it to be true that an English court will not assume jurisdiction to deal directly with either the property in or the possession of real estate which forms part of a foreign country or a colony . . . yet . . . when an English court has before it parties to a contract, affecting immovables out of jurisdiction, it will, acting *in personam* and not *in rem*, 'upon the conscience' as it has been put, 'of the person living here,' when it finds equitable rights enforceable by a judgment *in personam*, give effect to that equitable right, and so indirectly affect the interests of the litigants in immovable property abroad."

The presumption in favour of the *lex situs* is, as we may conclude, of no avail if the contract is not intended "to have *direct* operation on the land,"¹ but is concerned with equitable interests only.

3. MARRIAGE SETTLEMENTS.

A man and a woman who are engaged to be married but are domiciled in different legal units, may agree to arrange their financial affairs for the time after the intended marriage but may omit to state expressly which law shall govern their marriage settlement.² The court will then ascertain the "proper law of the settlement" in accordance with the principles stated by Lord Greene, M.R., in *Duke of Marlborough v. A.G.*³—

In the case of a marriage settlement the law under which title is claimed is the law which governs the settlement. This law can only be the law by reference to which the settlement was made and which was intended by the parties to govern their rights and liabilities. There is, as it seems to us, a precise analogy between the law of the domicile in the case of wills⁴ and what is conveniently called "the proper law" of the settlement in the case of marriage settlements.

The special presumption invoked in some of these cases has been stated by Cozens-Hardy, L.J., in *In re Fitzgerald*⁵ as follows—

¹ Dicey, 5th ed., at p. 957 (end of note 20).

² See pp. 246, 247, *post*, where the subject is explained exhaustively.

³ [1945] Ch. 78, 83.

⁴ See p. 235, *post*.

⁵ *In re Fitzgerald: Surman v. Fitzgerald*, [1904] 1 Ch. 573, 587; Lindley, L.J., in *Re Martin: Loustalan v. Loustalan*, [1900] P. 211, 233. See *Chamberlain v. Napier* (1880), 15 Ch. D. 611 and the Scottish case *Corbet v. Waddell* (1879), 7 R. (Ct. of Sess.) 200.

As a general rule the law of the matrimonial domicile is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express stipulation that some other law shall apply.

The expression "matrimonial domicile" of the spouses denotes the place where the husband is domiciled at the date of the marriage.¹ The matrimonial domicile is common to both spouses. The presumption in favour of the law of the matrimonial domicile applies, in particular, to the essential validity of the marriage settlement.

The flexible nature which this presumption shares with all other presumptions designed for the determination of the proper law was displayed in *In re Bankes*,² where the court considered the presumption as rebutted by the surrounding circumstances of the case which pointed to another legal system. It would appear that the court will readily consider the presumption as disproved if the marriage settlement is executed in a form other than that prevailing at the matrimonial domicile, or if the spouses intend to choose as their matrimonial domicile a place other than the domicile of the husband at the time of the marriage.

It is, however, doubtful how far these principles extend to the question of the parties' capacity to conclude a marriage settlement. The rule in *In re Fitzgerald*³ is no direct authority on this point because the case dealt with a question of essential validity,⁴ but, on principle, all incidents of a contract should be governed by the same legal rule, namely the proper law doctrine. There are two cases unfavourable to the view that the capacity to conclude a marriage settlement is governed by the domicile of the intended husband at the time of the marriage; viz. *In re Cooke's Trusts*⁵ and *Cooper v. Cooper*.⁶

In *Cooper v. Cooper*,⁶ an Irish lady, who intended to marry a domiciled Scotsman, had executed a marriage contract whereby she purported to waive certain preferential rights which the Scottish law concedes to a widow at the death of her husband. The Irish lady was an infant at the time of the conclusion of the contract. The contract was executed in Ireland before the parties went through the marriage ceremony. The parties resided during their married life in Scotland. After the death of the husband, the question arose whether the wife had had capacity to

¹ See p. 295, *post*.

² See *In re Bankes*, [1902] 2 Ch. 333; *In re Fitzgerald: Surman v. Fitzgerald*, [1904] 1 Ch. 573.

³ [1904] 1 Ch. 573.

⁴ Namely, with the question whether a Scottish settlement of domiciled English spouses containing a "strictly alimentary" interest and excluding the execution against the settled estate by creditors was valid against English creditors.

⁵ (1887), 3 T.L.R. 558.

⁶ (1888), 13 App. Cas. 88.

divest herself of the rights as a Scottish widow by the contract concluded during her infancy. The ante-nuptial domicil of the lady was Irish and, at the same time, the law of Ireland was the *lex loci contractus*. According to Irish law, the contract would have been void because of the wife's infancy. According to Scottish law as the law of the matrimonial domicil, however, the wife had due capacity to waive her legal portion.

The House of Lords held unanimously that Irish Law governed the case. Lord Halsbury decided in favour of Irish law because it was the *lex domicilii* of the wife before her marriage; Lord Watson and Lord Macnaghten admitted Irish law because it was both the *lex domicilii* and the *lex loci contractus*.

In neither of these cases did the court accede to the view that the capacity of the female infant to enter into a marriage settlement was governed by the law of the matrimonial domicil.¹ Professor Cheshire² offers, it is believed, well founded criticism to these decisions and observes that, on principle, the law of the matrimonial domicil should prevail. He comes to the conclusion that the authorities are still open to review.

IV. NEGOTIABLE INSTRUMENTS

The fourth kind of particular contracts that has to be considered concerns negotiable instruments.³ They require detailed treatment.

1. THE GENERAL POSITION.

A. Negotiability—a problem of classification. The question of the negotiability of a document is one of classification in the sense in which the term has been employed in earlier pages.⁴ In consequence, in an English suit the incident of negotiability has to be assessed in accordance with English law. It is not relevant whether the document in question is considered negotiable abroad or not. In particular, the negotiability of the document is not to be ascertained according to the law of the place where the contract was completed.

According to English law, negotiability is attributed to a document if the usage prevailing among the merchants in England considers such

¹ *Viditz v. O'Hagan*, [1899] 2 Ch. 569; reversed by C.A. in [1900] 2 Ch. 87 is not helpful for the view advocated in the context. The Court of Appeal apparently took the view that the law of domicil governed the capacity to conclude the marriage settlement and that, whilst the contract was still repudiable for infancy in accordance with the ante-nuptial *lex domicilii*, the subsequent change of the female infant to the domicil of her husband (matrimonial domicil) led to the application of the law of the matrimonial domicil to the future fate of the contract. "The effect of the change of domicil was to enlarge the reasonable time for repudiation" (*per* Lindley, M.R., at p. 98). The result would be that, here again, the capacity to conclude a marriage settlement was held to be governed by the *lex domicilii* of the wife before her marriage.

² Cheshire, 3rd ed., pp. 292-7.

³ J. D. Falconbridge, *The Law of Banks and Banking*, 4th ed., Canada, 1929, pp. 903 ss.

⁴ See p. 34, *ante*.

document as negotiable.¹ In addition, Parliament may declare documents negotiable, as happened in 1704² with respect to promissory notes.³ The mercantile custom is not "fixed and stereotyped." The English law merchant which is in essence a collection of judicially ratified mercantile customs has not yet been arrested in its growth by being moulded into a code; it is still, to use the words of Cockburn, C.J., in *Goodwin v. Roberts*,⁴ capable "of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce."⁵ If, therefore, an English court is called upon to decide whether an instrument is negotiable or not, it will hear evidence with respect to the usage in the mercantile world, and it will not refuse to recognise the negotiability of a commercial document merely because such recognition by English merchants is something of an innovation. "In these days usage is established much more quickly than it was in days gone by: more depends on the number of the transactions which help to create it than on the time over which the transactions are spread."⁶ Since according to English law English mercantile custom is the exclusive test of negotiability, it may well be that a document is not considered as negotiable in this country though it possesses that quality under the foreign legal system that created it. For the same reason the parties are barred from attributing the incident of negotiability to a commercial document by agreement.

B. The importance of the Bills of Exchange Act, 1882. The law relating to bills of exchange, cheques, promissory notes and bank notes is to a large extent consolidated in the Bills of Exchange Act, 1882. This statute contains express provisions dealing with the conflict of laws.⁷ They provide a basis for, but not an exhaustive⁸

¹ *Goodwin v. Roberts* (1875), L.R. 10 Exch. 337; *Edelstein v. Schuler & Co.*, [1902] 2 K.B. 144; *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q.B. 658.

² By 3 and 4 Anne, c. 9: An act for giving like remedy upon promissory notes, as is now used upon Bills of Exchange. See *De La Chaumette v. The Bank of England* (1831) 2 B. & Ad. 385.

³ To-day the main parts of the law relating to bills of exchange, cheques and promissory notes are regulated by statute; see the Bills of Exchange Act, 1882.

⁴ (1875), L.R. 10 Exch. 337, 346.

⁵ Kennedy, J., in *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q.B. 658, 678.

⁶ Bigham, J., in *Edelstein v. Schuler & Co.*, [1902] 2 K.B. 144, 155.

⁷ The most important of them is s. 72; the definition of a "foreign bill" is contained in s. 4; other provisions concerning the conflict of laws are s. 53 and s. 57 (2); they deal with the relation between English and Scottish law.

⁸ Lindley, L.J., in *Re Gillespie, Ex parte Roberts* (1886), 18 Q.B.D. 286, 293; Vaughan Williams, L.J., in *Embricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, 685; Banks, L.J., in *Koechlin et Cie v. Kestenbaum Bros.*, [1927] 1 K.B. 889, 895.

regulation of, the conflictual rules applicable to negotiable instruments. We shall consider them presently in detail. Dicey maintains¹ that these statutory provisions apply, with rare exceptions, two principles which derive from the law of contracts in general, namely that formal validity of the contracts contained in the instrument is governed by the *lex loci contractus*, and their essential validity by the proper law of the respective contracts. The embodiment in a statute of the conflictual rules has, however, led to a petrification of those rules. The flexibility characteristic of the proper law doctrine has been sacrificed in favour of the principle of certainty in commercial dealings. Criticism of various aspects of the statutory regulation has been offered from the judicial Bench² and by Dicey,³ Westlake,⁴ Professor Cheshire⁵ and Dean Falconbridge.⁶

The following explanation of the statutory provisions deals, in the first instance, with bills of exchange. The rules apply, however, to other kinds of negotiable instruments.⁷

It is essential for an approach to the conflictual problems arising in connection with bills of exchange to remember that a bill of exchange does not represent an individual contract but a series of different promises which, while being in many respects independent, are in others, however, closely inter-connected for the reason that they are embodied in the same instrument. This explains why the different promises contained in a bill of exchange may be subject to different legal systems.⁸

2. THE PROVISIONS OF THE BILLS OF EXCHANGE ACT, 1882.

A. The text of the Act. The sections of the Bills of Exchange Act, 1882, dealing with conflictual rules run as follows—

Section 4. (1) An inland bill is a bill which is, or on the face of it purports to be (a) drawn and payable within the British Islands or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purpose of this Act "British Islands," mean any part of the United Kingdom of Great Britain and Ireland, the Islands of

¹ Dicey, 5th ed., p. 702; and "Conflict of Laws and Bills of Exchange" in *American Law Review*, 1882.

² Scrutton, L.J., in *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 2 K.B. 623, 670; Pickford, L.J., *ibid.*, at p. 634.

³ Dicey, 5th ed., p. 708.

⁴ Westlake, para. 231.

⁵ Cheshire, 3rd ed., p. 363.

⁶ Falconbridge, at p. 815.

⁷ Bills of Exchange Act, 1882, ss. 73, 89; see *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, 686.

⁸ Dicey, 5th ed., Rule 172, p. 703; see Mellor, J., in *Lebel v. Tucker* (1867), L.R. 3, Q.B. 77.

Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

Section 72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance *supra* protest, is determined by the law of the place where such contract was made.

Provided that—

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

(b) Where a bill issued out of the United Kingdom conforms, as regards requisites in form, to the law of the United Kingdom, it may for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this Act the interpretation of the drawing, indorsement, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payor be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight draft at the place of payment on the day the bill is payable.

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

B. Definitions. In the first place the distinction between an inland and a foreign bill should be noted.¹

“A foreign bill is a bill which

(a) either is drawn by a person who is not resident in the British Islands,

(b) or is drawn by a person resident in the British Islands on a person resident abroad *and* is payable abroad.”²

It will be observed that the quality of an inland bill is not affected by the situation of the payee in a foreign country provided that the

¹ Bills of Exchange Act, 1882, s. 4.

² C. M. Schmitthoff, *The Export Trade*, 1948, p. 137.

place of payment is in the British Islands. Furthermore, an inland bill does not lose that quality by any subsequent contracts embodied in it, as for instance by indorsements effected in foreign countries. The most conspicuous difference between an inland bill and a foreign bill is that a foreign bill must be protested if dishonoured but that no protest is required in the case of an inland bill.¹

It is, further, a general rule that "every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's is incomplete and revocable, until delivery of the documents."² The references in Sect. 72 to the "place of issue" or to the "place where the contract is made" should, therefore, be read as relating to the place where the delivery of the document takes place,³ and not as meaning the place where the promisor has signed the document.

C. Form. With respect to form,⁴ Sect. 72 (1) of the Act lays down the principle that every separate contract contained in a bill of exchange has to satisfy the law of the place where the contract was concluded. The stereotyping influence of the statutory provisions is evident if we compare this provision with the general rules already examined.⁵ According to the latter, the form of a contract is determined by the proper law of the contract which is presumed to be the *lex loci contractus*, but this presumption is not absolute. The statutory provision, on the other hand, is conclusive; it admits of only two exceptions which are expressly stated in the Act. In short, the rebuttable presumption in favour of the *lex loci contractus* has become irrebuttable by the Act. The following issues have been regarded as questions of form, viz. whether a bill of exchange contains an unconditional or merely a conditional promise,⁶ or whether an undisclosed agent can execute a valid indorsement.⁷

The Act admits the two following exceptions to the rigid rule of the *lex loci contractus*:

(a) The case of foreign stamp laws. It will be remembered that, if the foreign stamp law is merely of an evidential character, a document not complying therewith is admissible as evidence in the English court. On the other hand, if the foreign stamp law provides a form

¹ Bills of Exchange Act, 1882, s. 51.

² *Ibid.*, s. 21.

³ *Chapman v. Cottrell* (1865), 34 L.J. Ex. 186.

⁴ Personal capacity is not regulated by the provisions of the Act. Therefore the question of capacity to conclude a contract expressed in a bill of exchange is governed by the general law of contracts; see *Byles on Bills*, 20th ed., 1939, pp. 316, 323.

⁵ See p. 112, *ante*.

⁶ *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 1 K.B. 43; [1918] 2 K.B. 623.

⁷ *Koechlin et Cie v. Kestenbaum Bros.*, [1927] 1 K.B. 889; *per Bankes, L.J.*, at p. 896; *Sargent, L.J.*, *dubitante*, at p. 899. See p. 139, *post*.

of an essential nature, i.e. if it considers the contract as invalid for want of a proper stamp, a claim on the document is not sustainable in the English courts.¹ "The Act appears to negative the latter branch of this principle."² The result is that in no case does the omission to stamp a bill in accordance with the stamp laws prevailing at the place of issue invalidate the bill. In other words, with respect to negotiable instruments, the difference between the evidential and substantial form has been obliterated so far as foreign stamp laws are concerned.

(b) The case of a foreign bill conforming as regards requisites in form to the law of the United Kingdom but not to the *lex loci contractus*. According to the general principle of the statutory provision such a bill would be void. By means of a proviso, however, the partial validity of such a bill is prescribed. If the bill is negotiated or held by persons within the United Kingdom or if such persons became parties to it, the bill is to be treated as valid, but merely for the purpose of enforcing the payment thereof.³ The proviso is designed to protect British holders of bills, and is incidentally, as Dicey⁴ observes, also a concession to the proper law doctrine because it recognises as valid a contract satisfying the form of the place where it is to become operative according to the intention of the parties.⁵

D. Essential Validity. Sect. 72 (2) of the Act provides that the "interpretation" of a contract contained in a bill is to be governed by the law of the country where the contract is made. In this connection, the term "interpretation" has to be construed liberally. The draftsman of the Act suggests that this term "clearly includes the obligations of the parties as deduced from such interpretation."⁶ This view has been confirmed by judicial authority.⁷ In *Alcock v. Smith*,⁸ Romer, J., observed that interpretation in this subsection

¹ See p. 116, *ante*.

² Chalmers, *Bills of Exchange*, 11th ed. (1947), at p. 235.

³ And not, it would appear, for a declaration that the holder might retain money paid to him or prevent the acceptor from recovering money paid to him; Bailhache, J., in *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 1 K.B. 43, 55.

⁴ Dicey, 5th ed., p. 705.

⁵ See also the following case which was decided prior to the Act but is still good law with respect to proviso (b): *Re Marseilles Extension Railway & Land Co.* (1885), 30 Ch. D. 598, 603; see also *Trimbey v. Vignier* (1834), 1 Bing. (N.C.) 151; *Bradlaugh v. de Rin* (1868), L.R. 3 C.P. 538; (1870), L.R. 5 C.P.

⁶ Chalmers, *op. cit.*, p. 236; Sir M. Chalmers's statement is approved by Andrews, J., in the Canadian case, *London & Brazilian Bank v. Maguire* (1895), 8 Q.R.C.S. 358, 362.

⁷ *Koechlin et Cie v. Kestenbaum*, [1927] 1 K.B. 889; *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677; *Alcock v. Smith*, [1892] 1 Ch. 238.

⁸ [1892] 1 Ch. 238, 256; followed by Russell, J., in *Sanders v. St. Helens Smelting Co. Ltd.* (1906), 39 Nova Scotia Rep. 370, 372.

included "the legal effect" of the contract. This subsection deals, therefore, with what is usually called the "essential," as opposed to the formal, validity of the contract. The construction and interpretation of the document,¹ the quality and import of the obligations arising from the agreement of the parties, the legality of the promises embodied in the document²—these and similar questions all fall under the subsection. The Act admits, however, of an exception, which will be examined later,³ to the rule of the *lex loci contractus* in questions of essential validity.

Here again the Act has introduced a certain rigidity in the rules generally governing the contract. The Act has replaced the proper law doctrine by an absolute provision in favour of the *lex loci contractus*. The exclusion of the *lex loci solutionis* leads to a remarkable result. If a bill is drawn in England on a drawee in America but is payable in Canada, it would appear that American law, and not Canadian law, governs the essential validity of the bill whereas, according to the proper law doctrine, Canadian law as the *lex loci solutionis* would apply. Dean Falconbridge⁴ comments on the arbitrary character of the statutory provision, and Dicey⁵ explains this hardly justifiable result as a misunderstanding of some observations of Story in his *Commentary on the Law of Bills of Exchange*.⁶ Byles⁷ observes that, from the practical point of view, the departure from the proper law doctrine is not serious because, in general, the place of payment will coincide with that of the acceptance of the bill, and here the law of the latter as the *lex loci contractus* applies because the acceptance is regarded as a separate stipulation.

The operation of the principle laid down in the sub-section under consideration is illustrated by *Embiricos v. Anglo-Austrian Bank*.⁸

In this case, the validity of an indorsement was in issue. A Roumanian Bank drew in Roumania a cheque on a London Bank payable to the plaintiffs, Messrs. L. & M. Embiricos, or order. The plaintiffs indorsed the cheque in Roumania to a London firm and posted it to them. A clerk of the plaintiffs stole the cheque, forged the indorsement of the London firm and negotiated the cheque to bankers in Vienna who were acting in good faith and upon inquiry with the Roumanian Bank paid the value to the fraudulent clerk. The Vienna Bank then indorsed the cheque to the defendants in London and the latter presented it to the drawees who honoured the cheque.

¹ *Sanders v. St. Helens Smelting Co. Ltd.*, *supra*.

² *Alcock v. Smith*, *supra*; *Embiricos v. Anglo-Austrian Bank*, *supra*; *Koechlin et Cie v. Kestenbaum Bros.*, *supra*.

³ See p. 140, *post*.

⁴ Falconbridge, p. 815.

⁵ Dicey, 5th ed., p. 707.

⁶ Ss. 153, 154.

⁷ *Byles on Bills*, 20th ed., 1939, p. 319.

⁸ [1905] 1 K.B. 677; see also *Alcock v. Smith*, [1892] 1 Ch. 238.

By this action the plaintiffs claimed back the money from the defendants alleging conversion of the cheque. The defence was that, according to Austrian law, the defendants had acquired a good title from their Austrian assignors; and that, according to Austrian law, a *bona fide* indorsee may acquire a title even on the strength of a forged indorsement. The plaintiffs replied that the title of the defendants had to be ascertained according to English law which does not recognise¹ a good title through a forged indorsement.

The Court of Appeal (Vaughan Williams, L.J., Romer, L.J., Sterling, L.J.) held that the validity of the indorsement was governed by Austrian law and decided, therefore, in favour of the defendants. Vaughan Williams, L.J., and Romer, L.J., based their decision on the ground that Austrian law was the law governing the transfer of chattels² in general. Stirling, L.J., and Walton, J., who had decided the case in the King's Bench Division, attached more weight to the additional ground that the case was covered by Sect. 72 (2) of the Bills of Exchange Act, 1882.

The fact that the subsection last mentioned expressly refers to the case of indorsements clearly indicates that the *lex loci contractus* is intended to apply also to the case of the negotiation of the bill. This point was expressly decided in the leading case of *Koechlin et Cie v. Kestenbaum Bros.*³ The importance of this case consists further in the fact that it decides beyond argument that the term "interpretation" in the subsection in question is equivalent to "essential validity."

In *Koechlin et Cie v. Kestenbaum Bros.*⁴ a bill of exchange was drawn in France by one E. V. on the defendants Kestenbaum Bros., London, as drawees. The payee was one M. V. who was the father of the drawer and also resided in France. The bill was accepted for payment by the defendants and was made payable at a bank in London. Subsequently, the bill was indorsed by the drawer E. V. in his own name to the plaintiffs, but it never showed an indorsement of the payee M. V. The defendants refused to pay the bill. The plaintiffs maintained that they were holders in due course and sued the defendants as acceptors. The defence was that the indorsement was irregular on the face of it because it did not emanate from the payee⁵ and that, according to English law no oral evidence was admissible that E. V. acted as agent for the payee. The plaintiffs replied that, as the validity of the indorsement was governed by French law, E. V.'s indorsement was good.

The Court of Appeal (Bankes, L.J., Sargant, L.J. and Avory, J.) held that the case was covered by Sect. 72 of the Act and that the validity of the indorsement was to be determined according to French law. The Court therefore gave judgment against the defendants. Sargant, L.J., was inclined to consider the issue as a question of form governed by Sect. 72 (1) but explained that, if it was not covered by that subsection, it was covered by sub-sect. (2) "in view of the very wide effect of the decision in *Embiricos v. Anglo-Austrian Bank.*"⁶

"If the indorsement in fact made is according to the law of the

¹ [1905] 1 K.B. 677; also *Alcock v. Smith*, [1892] 1 Ch. 238.

² A cheque or bill of exchange is regarded by English law as a chattel. That is the reason why it is capable of conversion. See pp. 198, 199, *post*.

³ [1927] 1 K.B. 889.

⁴ S. 31 (3) of the Bills of Exchange Act, 1882.

⁵ [1905] 1 K.B. 677.

place where it is made sufficient to give a title to the indorsee it appears to me that by the express terms of the Act the indorsee is entitled to sue. The effect is not to increase the liabilities of the acceptor, but merely to enlarge the methods by which the right to enforce these liabilities can be transferred from the person originally entitled to them to some subsequent indorsee."

We shall now consider the exception admitted by the Act to the rule that the essential validity of a contract contained in a bill of exchange is determined by the law of the place where the contract was made.

The proviso to subsect. (2) enacts that, in the case of an inland bill indorsed in a foreign country, the indorsement is to be interpreted, as regards the payor, according to the law of the United Kingdom. This provision appears to be a concession to the proper law doctrine. It codifies the law as it stood before the Act.¹ Thus where an inland bill was indorsed in France in a manner void according to French, but valid according to English law, it was held that the obligation of the acceptor towards the indorsee was not affected thereby.² In consequence, the purchaser of an inland bill is in a more favourable position than the purchaser of a foreign bill whose rights may be defeated by some infirmity imposed by the foreign law. Conversely, the liability of the acceptor may be greater in the case of a foreign bill than in the case of an inland bill. Sargant, L.J.,³ described as follows the situation which existed prior to the Act and which the Act purported to adopt:

The result was that anyone dealing with a foreign bill of exchange was in a less certain position than a person dealing with an inland bill, because in the case of an indorsement abroad on a foreign bill he might find substituted for the person to whom the transfer would have been good if made in England, a person to whom the transfer by indorsement would be good if made according to the law of the country in which it was made.

E. Performance. The rules relating to the performance of the obligations arising from a bill of exchange are to be found in the provisions of subsect. (3) to (5) of sect. 72. We shall first consider subsects. (4) and (5) which, as Dicey⁴ remarks, accord with the principle applicable to contracts in general. Both subsections deal with certain ancillary rules relating to payment and provide that the law of the place of payment shall govern them. Subsect. (4) provides that, if a foreign bill expressed in foreign currency is made payable in

¹ *Lebel v. Tucker* (1867), L.R. 3 Q.B. 77; *De La Chaumette v. The Bank of England* (1831), 2 B. & Ad. 385.

² *Lebel v. Tucker*, *supra*.

³ Sargant, L.J., in *Koechlin et Cie v. Kestenbaum Bros.*, [1927] 1 K.B. 889, 898.

⁴ Dicey, 5th ed., p. 711 (Dicey's remark is made in the Comment to ss. 4).

the United Kingdom, the amount of payment is to be calculated—in the absence of express stipulations—according to the rate of exchange for sight drafts at the (English) place of payment. This is in accordance with the principle laid down in such cases as *Anderson v. Equitable Life Assurance*¹ and in *Re Chesterman's Trust*.² Subsect. (5) provides that the due date of a bill is to be determined by the law of the place where the bill is payable.

Thus, in *In re Franke & Rasch*³ an English bank purchased before the First World War bills payable in Germany and Austria. The war legislation of these countries postponed the maturity of the bills indefinitely. The English Bank brought an action against the acceptor in the English courts, but failed because the postponement of the dates of maturity by the German and Austrian decrees was effective against the holder.

The "strange wording" of Sect. 72 (3), which has elicited wide criticism,⁴ becomes more intelligible if we first examine the incidents peculiar to the stipulation of the acceptor and relating directly to his promise, namely presentment for acceptance of payment or the necessity or sufficiency of a protest. These incidents refer without exception to the mode of payment. On principle, they should be governed by the *lex loci solutionis*. There is, for this reason, great force in Foote's⁵ interpretation of this subsection, namely that it is "at least reasonable to presume that these incidents of non-payment will be governed by the same law that applies to all incidents of payment." Greater difficulties arise if we now turn from the direct stipulation of the acceptor to the effect of such non-payment on the promises of the other obligees, and in particular on the relationship between the various indorsers. Here, the words of the subsection do not provide a safe guide. In view of the lack of recent authorities it is necessary to resort to cases decided prior to the Act of 1882. *Rothschild v. Currie*⁶ supports the conclusion that, as between the indorsers, the necessity and note of the protest and notice of dishonour depend equally on the law of the place where the acceptor had to pay the bill. In this case both the indorser and the indorsee were resident in England, but the bill was payable in France. Lord Denman, C.J., held that protest and notice of dishonour were governed by French law. On the other hand the great authority of *Horne v.*

¹ (1926), 142 T.L.R. 302, 123.

² [1923] 2 Ch. 466.

³ [1918] 1 Ch. 470; see also *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525.

⁴ Chalmers, *op. cit.* 11th ed., 1947, p. 239 note 43; Westlake, 7th ed., p. 322; Dicey, 5th ed., p. 712; Cheshire, 3rd ed., p. 363; Falconbridge, 4th ed., pp. 846-7.

⁵ Foote, 5th ed. (1925), pp. 460-1.

⁶ (1841), 1 Q.B. 43; *Hirschfeld v. Smith* (1866), L.R. 1 C.P. 340.

Rouquette,¹ on which Westlake² places his interpretation of subsect. (3), is not consistent with this view. In *Horne v. Rouquette*¹ a bill drawn in England and payable in Spain was indorsed by an English indorser to a Spanish indorsee. The bill was dishonoured and a notice of dishonour was given by the indorsee which was good according to Spanish law but bad according to English law. The indorsee claimed, as in *Rothschild v. Currie*,³ recourse against his indorser, and the Court of Appeal gave judgment in his favour, on the ground that the mode of the notice of dishonour depended on the contract between indorser and indorsee, and consequently on the place where this contract had to be discharged. The Court of Appeal could have arrived at the same result by accepting Lord Denman's doctrine in *Rothschild v. Currie* but the Court expressly adopted a different line of reasoning. Both views, that in favour of the law of the place of the acceptor (*Rothschild v. Currie*³) and that in favour of the place of discharge by the indorser (*Horne v. Rouquette*¹) are reconcilable with the ambiguously worded subsect. (3) though the view that notice of dishonour as between the indorser and indorsee is governed by the law prevailing at the place where the acceptor has to pay does not strain the words of the enactment so much as Westlake's interpretation⁴ does. It is suggested that the true meaning of this subsection is that the necessity for and mode of protest and notice of dishonour as between indorsers is governed by the same law that determines ancillary rules relating to payment by the acceptor, namely by the law of the place where the bill was made payable and dishonoured. Two reasons can be advanced in favour of this view. First, the indorser when assigning the bill to the indorsee is fully aware that the bill has to be paid at the stated place of payment. "The indorser of a bill accepted payable in France, promises to pay in the event of dishonour in France, and notice thereof. By his contract he must be taken to know the law of France relating to the dishonour of bills; and notice of dishonour is a portion of that law."⁴ Secondly, as Dean Falconbridge⁵ observes, it appears preferable that questions extending to protest and notice of dishonour should, as far as the indorsers of a bill are concerned, be regulated by a uniform law rather than by a plurality of them. *Horne v. Rouquette*¹ is not a conclusive authority against this view because there the place of payment of the bill and the place where the indorser

¹ (1878), 3 Q.B. D. 514.

² Westlake, 7th ed., para. 232, pp. 322-3; Dicey, 5th ed., p. 710.

³ (1841) 1 Q.B. 43.

⁴ Per Erle, C.J., in *Hirschfeld v. Smith* (1866), L.R. 1 C.P. 340, 352.

⁵ Falconbridge, *op. cit.*, p. 846.

had to meet his promise happened to coincide—and the observations of the Court of Appeal were not strictly necessary for the decision.¹

The result is that all ancillary rules with respect to presentment for acceptance or payment, or with respect to protest or notice of dishonour are governed by the law prevailing at the place of the payment of the bill, no matter whether the issue is the original promise of the acceptor or a subsequent contract between indorser and indorsee.

¹ Dicey, 5th ed., p. 710.

CHAPTER VI

THE LAW OF TORTS*

I. DIFFERENT THEORIES OF TORTIOUS LIABILITY

The theoretical basis of the enforcement of rights arising from torts committed in foreign countries¹ is a matter of considerable controversy. Four theories have been advanced which shall be examined in their turn. They are not merely academic explanations, but represent different modes of approach leading to widely divergent practical results.

1. THE *LEX LOCI DELICTI* THEORY.

It would appear natural that the law of the place where a wrong is committed should govern the rights of the person injured and the liability of the tortfeasor. This view is prevalent in the United States.² The American *Restatement*,³ for instance, declares—

If a cause of action in tort is created at the place of wrong, a cause of action will be recognised in other states.

If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.

The doctrine that the law of the place where a wrong is committed (*lex loci delicti*) governs the liability of the tortfeasor without qualification is in complete harmony with the postulate of the English system of conflict of laws that *prima facie* every duly acquired foreign right deserves protection in the English courts. From the point of view of jurisprudence, this result is, therefore, commendable. The English system of conflict of laws can never dissociate itself from this rule. The real issue is whether this doctrine is to be applied unreservedly or with certain qualifications. The operation of the unqualified application of the *lex loci delicti* theory, and at the same time, the reasons in favour of a limitation of that application may be demonstrated by the following fictitious example. If A were called a

* For further reading: Lorenzen, "Tort Liability and the Conflict of Laws," in 47 *L.Q.R.* (1931), 483. R. K. Kuratowski, "Torts in Private International Law," *International Law Quarterly* (1947), p. 172.

¹ A tort committed entirely in England is governed by English and not by foreign law, even though it is committed by a foreign Government official in the course of his public duties against another official of the same Government; *Szalai-May-Stacho v. Fink*, [1947] 1 K.B. 1.

² Dicey, 5th ed., p. 770 and cases in note (d).

³ American *Restatement*, para. 384, p. 470.

"bastard" in Cape Town, he could, according to the *lex loci delicti* theory, recover damages in an English Court on mere proof of the verbal insult because under Roman-Dutch law such an insult is actionable as such,¹ whereas if the slander were uttered in England, no action would ordinarily lie in such a case; the application of the unrestricted *lex loci delicti* theory would, therefore, compel English courts to adjudicate on torts committed abroad which could not be brought within the general classification of wrongs in English law; English courts would thus have to adjudicate on issues with which they were not familiar. Furthermore, foreign suitors would receive preferential treatment over suitors basing their claim on a tort committed within the jurisdiction. It is evident that, from the practical point of view, these are grave objections against the unqualified application of the theory of the *lex loci delicti*.

2. THE OBLIGATION THEORY.

Another theory on the basis of tortious liability in conflictual cases has been advanced in the United States of America by Professor Beale but is not universally accepted in that country.² The theory is based on the following classification, suggested by Professor Beale,³ of all rights into primary and secondary rights viz.—

The first division, primary rights, includes all rights created by law and existent in the ordinary proper course of events, unaffected by illegal interference. The second division, secondary rights, includes rights which arise upon violation of primary rights, by the wrong of some responsible human actor; they are created by law in order that reparation may be made for the wrongful destruction of each primary right.⁴

The right not to be libelled, not to be assaulted, or (passing from torts against the person to those against property) the right not to suffer a nuisance or trespass to land, or not to have one's goods converted, are primary rights; claims for damages or for an injunction or for recovery of detained goods are rights of a secondary nature resulting from the infringement of primary rights; they are obligations of the tortfeasor arising from the violation of the primary rights. The supporters of this theory contend that the *lex delicti commissi* is

¹ Maasdorp, *Institutes of South African Law*, 4th ed., Vol. IV, pp. 138, 141.

² W. W. Cook, "The Logical and Legal Bases of the Conflict of Laws," 33 *Yale Law Journal* (1924), p. 457; Lorenzen, *loc. cit.*, at p. 486. Professor Cheshire supported the obligation theory in the first two editions of his textbook but rejects it in the third edition (3rd ed., p. 368).

³ 1 Beale, 66; the Professor adds a third category of rights which he calls remedial rights, consisting of the rights to sue and to enforce judgment.

⁴ 1 Beale, 66-7.

irrebuttably presumed to govern all incidents of the obligation of the tortfeasor. According to this theory, all incidents regularly pertaining to procedure (and, in consequence, ordinarily governed by the *lex fori*) as, for instance, the measure of damages, are governed by the law of the place where the tort was committed. The practical consequences of the obligation theory, therefore, go further than those dependent upon the first mentioned theory of the unqualified applicability of the *lex loci delicti*.

The support secured for the obligation theory is reinforced by the following observations of Mr. Justice Holmes ¹—

The theory of the foreign suit is, that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, which like other obligations follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation but equally determines its extent.

However, this theory is opposed by eminent jurists in the United States,² and Judge Learned Hand, another well known American judge, expresses his disagreement with Mr. Justice Holmes's views in the following terms ³—

When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. . . . However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognised by that sovereign.

The obligation theory is not reconcilable with the English authorities inasmuch as authority is already lacking for the view that the dichotomy into primary and secondary rights has been accepted by English law.⁴

3. THE *LEX FORI* THEORY.

According to a third theory, a tort committed in a foreign country is in all respects subject to the *lex fori*. According to this theory,

¹ *Slater v. Mexican National Railway* (1904), 194 U.S. 120; 24 Sup. Ct. 581.

² See p. 145, note 2, *ante*.

³ In *Guinness v. Miller* (1923), 291 Fed. 769, at p. 770; and *The James M'Gee* (1924), 300 Fed. 93, at p. 96.

⁴ See, however, Cockburn, C.J., in *Phillips v. Eyre* (1869), 4 Q.B. 225, 238: "Upon every wrongful act inflicting a personal injury a right of action immediately accrues to the party wronged, and becomes a vested right."

Willes, J., in *Phillips v. Eyre* (1870), 6 Q.B. 1, 30, speaks of "accessory rights" in the meaning of remedial rights; this is the third division of Professor Beale's classification which has not been referred to in the context. The observations of Willes, J., do not, as Professor Cheshire appears to assume (3rd ed., p. 368), support the obligation theory.

the courts, in passing judgment upon torts committed abroad, should disregard the place where the wrong was perpetrated and should deal with the issue as if the cause of action had arisen within their jurisdiction. This doctrine which is advocated by Savigny¹ is based on the view that tortious liability is closely related to responsibility under Criminal Law.² The application of the unqualified *lex fori* does not harmonise with the rules of the English conflict because it neglects entirely the conclusions which are the outcome of the vested right doctrine. The theory meets, however, to a large extent the objections raised against the unqualified application of the *lex loci delicti*. Under the *lex fori* theory, the courts would apply only those legal notions with which they are familiar and, consequently, it could not happen that persons who suffered a wrong abroad would obtain redress in the courts, whereas persons suffering the same injury within the jurisdiction were left without a remedy.

4. THE ENGLISH DOCTRINE.

The doctrine deducible from the English decisions represents a common sense compromise between the unqualified *lex loci delicti* theory and the *lex fori* theory. The English courts have regard primarily to the *lex loci delicti* which, as we have seen, is in consonance with the English theory of vested rights. The objections to the *lex loci delicti* doctrine are met by the simultaneous application of the *lex fori*, an application amply justified by that ultimate reservation in favour of the public policy of the *forum* which has already been discussed.³ The result is the rule that an action based on a foreign tort can be maintained in the English courts if the act complained of is a tort both according to the law of the place where it was committed and according to the law of the place where the action is brought.

In principle, this compromise would appear to be quite sound.⁴ It is not, however, easy to determine certain of the details of the compromise. It is evident that the foreign tort must be such a tort as is actionable according to English law and that a technical defence under the *lex fori* (such as arises under the Limitation Act, 1939) would divest the foreign tort of its actionability in the English courts. Doubt, however, arises as to the exact conditions which the foreign tort must satisfy with respect to the *lex loci delicti*. By which of

¹ Guthrie's translation, pp. 205, 207.

² For authors following Savigny's view, see Lorenzen in 27 *L.Q.R.* 488.

³ See p. 50, *ante*.

⁴ Lorenzen in 47 *L.Q.R.* 483, 488 (1931); H. C. Gutteridge, "A new approach to Private International Law," in 6 *Cambridge Law Journal* (1938), 16, 20.

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law where it was done.

These definitions are similar in essence. It will be our task to determine as accurately as possible what is meant by the expressions—

- (1) "not justifiable" according to the *lex loci delicti*, and
- (2) "actionable" according to English law.

1. "NOT JUSTIFIABLE" ACCORDING TO THE *LEX LOCI DELICTI*.

Professor Cheshire, in the first edition of his textbook,¹ has with commendable exactitude in the light of the existing decisions on the subject, dissected the component parts of the first of these conditions as follows—

An action cannot be maintained in England for an act which, according to the *lex loci commissi*

- (a) creates no liability whatsoever, or
- (b) is one for which the defendant has a valid defence; or
- (c) is one which has been legalised by some competent authority.

We shall now proceed to examine in detail these three component parts.

A. No liability. If according to the law of the place where the wrong has been committed no liability ensues, the action of the wrongdoer cannot be made the subject of a suit in an English court. The foreign law may not consider the facts complained of as constituting a tort at all. The tort of conspiracy or of champerty, or the tort of enticing away a wife or servant may not be recognised by the legal system prevalent at the *locus delicti commissi*. Again, the foreign law may not admit a liability resulting from the operation of any rule similar to the *respondeat superior* rule in English law. Thus

in *The Mary Moxham*² an English ship had damaged a pier in Spain. It was proved that the master and the crew had acted negligently. The pier was owned or occupied by an English company. The ship had been arrested in Spain and was released upon an agreement between the parties that the case against the ship and her owners should be tried before the English courts.³ The company which owned the pier instituted proceedings against the proprietors of the ship basing their claim on trespass against land committed by the defendants' servants. The defence was

¹ 1st ed., p. 223.

² (1876), 1 P.D. 107.

³ In view of this agreement, no objection was raised in this case to the jurisdiction of the Admiralty Court on the ground that the claim was for damages to foreign land; see Bucknill, J., in *The Totten* (1946), 175 L.T. 469, 471, and p. 399, *post*.

that according to Spanish law the owners were not liable for the negligent acts of their servants.

The Court of Appeal dismissed the action. Mellish, L.J., said: "If by the law which is to govern the case the defendant is not liable for the act of the master,¹ he has a good defence to the action."

B. Valid legal defence. On the question whether a technical legal defence admitted by the *lex loci delicti* renders the act "justifiable," the authorities are in apparent conflict. In *Machado v. Fontes*² the Court of Appeal rejected the defence that the foreign law (while considering as a criminal offence the wrong complained of) did not provide an action for damages for the wrong. On the other hand, in *Walpole v. Canadian Northern Railway*³ and in *McMillan v. Canadian Northern Railway*,⁴ the Judicial Committee advised against the actionability of the foreign wrong on the ground that the foreign law regarded the wrong as entailing compensation under the Workmen's Compensation legislation, but not a claim for damages. These two cases, though not directly binding on the English courts, remain, of course, of high persuasive authority.

At first sight, the decisions in *Machado v. Fontes*⁵ and in the two Canadian cases appear irreconcilable.

In *Machado v. Fontes*⁶ the facts were as follows. The plaintiff sued the defendant for a libel alleged to have been published in Brazil. According to Brazilian law, the statement complained of was punishable in Brazil as a criminal offence but was not actionable in the civil courts as a tort. The defendant sought to amend his defence by adding a plea explaining the position under Brazilian law. The plaintiff opposed the amendment as irrelevant. The Judge in Chambers admitted the new count. On appeal, the Court of Appeal reversed the decision and ordered the plea to be struck out. Rigby, L.J., expressed the view that the distinction drawn by Willes, J., in *Phillips v. Eyre*⁷ between "actionable" and "justifiable" "was deliberate." With respect to the latter term, Rigby, L.J., said: "But though such action may be brought here, it does not follow that it would succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shewn by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocency of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act must be 'justifiable' by the law of the place where it is done." The learned Judge dismissed, as pertaining to the remedy only, the fact that no civil action for damages would lie in Brazil. Since "we must act according to our own rules in the damages (if any) which we may choose to give," his Lordship regarded it irrelevant that the wrong complained of was, according to the *lex loci delicti*, in the nature of a crime and not of a tort.

¹ Viz. the master of the ship, who was in law the servant of the defendants.

² [1897] 2 Q.B. 231.

⁴ [1923] A.C. 120.

⁵ [1897] 2 Q.B. 231.

³ [1923] A.C. 113.

⁶ (1870), 6 Q.B. 1.

In *Walpole v. Canadian Northern Railway Company*¹ and in *McMillan v. Canadian Northern Railway Company*² the defence was that an action for damages was not maintainable on account of the operation, at the *locus delicti*, of a Workmen's Compensation Act. In both cases, an employee of the defendant railway company was injured in the course of his employment.

In *Walpole's* case, the injury, which had proved fatal, was suffered in British Columbia; the deceased was resident in that province but his wife who brought the action had moved from British Columbia to Saskatchewan. British Columbia was, therefore, the place where the wrong had been committed, and the law of Saskatchewan was the *lex fori*; The defence of the railway company was that, according to the Workmen's Compensation Act of British Columbia, the deceased, if alive, would have had a claim for compensation under the Act against the Workmen's Compensation Board only, and that his common law remedy for negligence against the tortfeasor was expressly excluded by that Act.

In *McMillan's* Case, the issue was similar, the injury having been suffered in Ontario and the action being brought in Saskatchewan. According to the law of Ontario, the rule of common employment applied³ and, in addition, the Workmen's Compensation Act of Ontario, substituted, like that of British Columbia, a claim of compensation for the common law action of negligence; but here the claim for compensation would have lain against the tortfeasor and not against a Compensation Board. The defence of the railway company was that no unjustifiable wrong was committed according to the *lex loci delicti*; this defence was based, first, on the common employment rule in Ontario and, secondly, on the exclusion of the action for negligence by the Workmen's Compensation Act.

In both cases, the Judicial Committee advised in favour of the defendant railway company.

In *Walpole's* case it was said⁴: "It is unnecessary for the purposes of this appeal to consider the precise meaning of the term 'justifiable', as used by Willes, J.; but at all events, it must have reference to *legal justification*⁵ and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule. In the present case the negligence of the company was not actionable in British Columbia; for, under the Workmen's Compensation Act of the Province, no action would lie against the company, but only a claim against the Board for Compensation."

In *McMillan's* case, the Judicial Committee observed:⁶ "No action for the negligence in question could have been brought against the company in Ontario apart from the statute, and the claim given by the statute is not a claim for damages for tort, but a claim (strictly limited in amount) for compensation for the accident."

The apparent difference of opinion between *Machado v. Fontes* and the two *Canadian Northern Railway* cases may be summarised as follows. In *Machado v. Fontes* it appears to have been held sufficient that the act complained of was a "wrong in itself."⁷ This case

¹ [1923] A.C. 113.

² [1923] A.C. 120.

³ This defence was unknown to the law of British Columbia or to that of Saskatchewan.

⁴ [1923] A.C. 113, 119.

⁵ Author's italics.

⁶ [1923] A.C. 120, 125.

⁷ *Per* Andrews, J., in *Dupont v. Quebec S.S. Co.* (1897), Q.R. 11 S.C. 188, 207. Dicey considers this case as wrongly decided.

implies that the expression "unjustifiable by the *lex loci delicti*" is to be understood "in a broad sense,"¹ meaning any act which is not innocent according to the foreign legal system. If this is the law, the two *Canadian Northern Railway* cases should have been decided differently, because an accident caused by negligence is a wrong in itself, whether the law attaches to it the sanction of an action for damages in tort or a claim for compensation under a Workmen's Compensation Act. On the other hand, if the two *Canadian Northern Railway* cases represent the law, *Machado v. Fontes* was wrongly decided, for, if the test is that the facts complained of must be actionable as a tort in the technical sense of an injury entailing a civil claim for damages, then an action for the foreign wrong would not be maintainable in the English courts if the foreign legal system refused to admit such a claim for damages and it would be irrelevant that the foreign law provided another sanction—be it criminal punishment or a special claim for compensation—for the wrong. In order to solve this apparent dilemma it is necessary to examine carefully the reasoning of the Court in *Machado v. Fontes*,² the more so as doubt has been expressed by the Bench whether the language employed by the Court of Appeal in this case was sufficiently precise.³ The Court of Appeal considered as irrelevant the plea that Brazilian law regarded the libellous statement as a crime only and not as a tort, in view of the well-known rule of the English conflict of laws that the measure of damages is an incident pertaining to procedural law and is, therefore, governed by the *lex fori*.⁴ The reference of Lopes, L.J., and Rigby, L.J., to the remedial nature of the amount of damages put it beyond doubt that this was the *ratio* of their decision.⁵ The decision was founded on the application of the procedural principle that, in the same way as English law, being the *lex fori*, has to determine the measure of damages, so English law has to decide whether damages payable in respect of an actionable wrong have to be paid at all. On this interpretation, *Machado v. Fontes*² does not appear to be at variance with the principle laid down in the two *Canadian Northern Railway* cases. The result is, therefore, that the principles expressed in these two cases represent the law. In consequence, a technical defence admitted in the courts of the *lex loci delicti* and negating the actionability, as a tort, of the facts complained of, likewise destroys

¹ Chief Justice Fuller in *Slater v. Mexican National Railway* (1904), 194 U.S. 120, 132.

² (1897), 2 Q.B. 231.

³ *Per curiam* in *Canadian Pacific Railway Co. v. Parent*, [1917] A.C. 195, 205.

⁴ See p. 368, *post*.

⁵ See *Baschet v. London Illustrated Standard Co.*, [1900] 1 Ch. 73.

the injured person's right to bring an action in the English courts (unless such defence goes merely to the measure of damages). This view is fortified by the undisputed fact that "legal justification" arising from ratification of the wrong by the legislature of the *locus delicti* renders the foreign wrong inadmissible in the English courts.

C. Legalisation. If a wrongful act committed abroad is subsequently condoned by the legislature of the place where the act was committed, the wrong is regarded as "justified" and the English courts will not entertain an action based on the wrong. This was decided in *Phillips v. Eyre*¹ and in *Carr v. Francis Times & Co.*²

In *Phillips v. Eyre*,¹ an action was brought against the governor of Jamaica for assault upon and false imprisonment of the plaintiff. The defence was that the alleged acts were committed during a rebellion and that the legislature of Jamaica had subsequently passed an Act of Indemnity declaring, in short, as lawful all *bona fide* acts done by the defendant and other persons in suppressing the rebellion and further avoiding all actions brought for injury sustained by such acts. The Court of Exchequer Chamber admitted this defence and dismissed the action. Willes, J., who delivered the judgment of the Court, after laying down the legal requirements for the admission of a foreign tort, explained that foreign laws affecting the liability of parties in respect of bygone transactions might either go to the remedy only, as an ordinary Statute of Limitations, and would then be no bar to an action in an English court, "but if the foreign law extinguishes the right, it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own legislature." The Act of Indemnity passed by the legislature of Jamaica was, in consequence, a complete answer to the claim.

2. "ACTIONABLE" ACCORDING TO ENGLISH LAW.

Considering now the second condition for the admissibility in the English courts of a suit founded on a foreign tort, namely, the actionability of the wrong according to English law, we shall, for purposes of comparison, arrange our observations under the same three heads which have been considered with respect to the first condition. This procedure will enable us to state whether the two conditions for the admissibility of an action arising from a tort committed abroad are collateral, or differing in extent.

A. No liability. A tort committed abroad cannot constitute a cause of action in an English suit if the facts complained of do not constitute a tort according to English law. Thus, in countries where

¹ (1869), L.R. 4 Q.B. 225; (1870), L.R. 6 Q.B. 1; see also *Mostyn v. Fabrigas* (1775), 1 Cowp. 161.

² [1902] A.C. 176; see also *Blad's Case* (1673), 3 Swan 603; (1674), *Blad v. Bamfield*, 3 Swan 604; *Dobree v. Napier* (1836), 2 Bing. (N.C.) 781.

Roman-Dutch law prevails, an action for mere insult is maintainable.¹ An insult inflicted in those countries would not, however, be actionable in the English courts. Further, a libel published abroad, which is not privileged according to the *lex loci delicti* but would have been privileged if published in England, would not be actionable in an English court.

B. Valid legal defence. A purely technical defence admitted by English law would also destroy the actionability in English courts of a foreign tort.

Thus, in *The Halley*,² a British steamer had damaged a Norwegian barque in Belgian territorial waters. The collision was caused by the negligence of the British ship, named *The Halley*. The owners of *The Halley* when sued in respect of the collision pleaded that they were under no liability because the vessel was at the time of the collision under the control of a compulsory Belgian pilot. This excused the defendants according to English law as it then stood,³ but it did not exempt them from liability according to Belgian law.

The Judicial Committee, on an appeal from the Court of Admiralty, advised that the reply referring to the operation of Belgian law should have been rejected. "The tort upon which this case is founded is one which would not be recognised by the law of England as creating any liability in, or cause of action against, the appellants." And later: "It is, in their Lordships' opinion, alike contrary to principle and to authority to hold that an English Court of Justice will enforce a foreign municipal law and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

C. Legalisation. It is beyond dispute that an enactment of the English legislature could qualify or even negative the actionability in English courts of a tort committed abroad. Such limitations are introduced, with respect to maritime torts, by the Merchant Shipping Act, 1894, and the Maritime Conventions Act, 1911. We shall deal with these enactments later.⁴ Here it is sufficient to observe the principle, namely that an enactment of the country where the issue is tried may interfere with the actionability of a foreign tort. It is immaterial whether the enactment was passed before or after the date of the commission of the tort.

3. CONCLUSION.

In conclusion, the two conditions requisite for suing upon a foreign tort in an English court are collateral. The "non-justifiability"

¹ See p. 145, *ante*.

² *The Liverpool, Brazil and River Plate Steam Navigation Co. Ltd. v. Benham, The Halley* (1868), L.R. 2 P.C. 193.

³ Merchant Shipping Act, 1854. The rule was altered by the Pilotage Act, 1913.

⁴ See p. 159, *post*.

according to the *lex loci delicti* and the "actionability" according to the *lex fori* are established in the same way, namely by proving that the facts complained of—

1. create a tortious liability,
2. admit of no "legal" justification, and
3. have not been legalised by statutory enactment.

We are now in a position to formulate an answer to the question¹ whether with respect to the requirement of the *lex loci delicti* English law has adopted the doctrine of non-justifiability or of actionability. The answer appears to be that though the authorities use a terminology indicative of the first doctrine, they actually adhere to the doctrine of actionability. The rules relating to the assumption by English courts of jurisdiction over foreign torts would, therefore, appear to be best expressed by describing, without reference to justifiability,² the two conditions upon which the rule depends, as was done by Brett, L.J., in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*,³ when he referred to

the well-known rule that for any tort committed in a foreign country within its own exclusive jurisdiction an action of tort cannot be maintained in this country unless the cause of action would be a cause of action in that country, and also would be a cause of action in this country. Both must combine if the tort alleged was committed within the exclusive jurisdiction of a foreign country.

Our statement of the English rules relating to the actionability in English courts of torts committed abroad will, therefore, be as follows—

- (1) an action for a tort committed in a foreign country can be maintained in an English court if the tort is actionable according to both the law of the place where it was committed and English law :
- (2) the quality of the tort committed in the foreign country is not affected by matters relating to the measure of damages which are considered as pertaining to the law of procedure.

III. MARITIME TORTS

Torts arising from negligent navigation of ships or committed by persons on board ships require special consideration. In this connection, it is important to distinguish between the general jurisdiction

¹ See p. 148, *ante*.

² The use of this term originates apparently in a decision of Lord Nottingham in *Blad's case* (1673), 3 Swan 603.

³ (1883), 10 Q.B.D. 521, 537; see further Dicey, 5th ed., at p. 771, Rule 188.

of the English courts in maritime matters and the law applicable to foreign torts. As regards the maritime jurisdiction of the English courts it is necessary to notice two points—first, that in civil matters the Admiralty jurisdiction *in rem* against ships may be invoked in every case which before the Judicature Act, 1873, constituted an “Admiralty action”;¹ and, secondly, that the criminal jurisdiction of the Central Criminal Court, as the successor of the Court of Admiralty in criminal matters, extends even to rivers in foreign territory where the tide ebbs and flows below the first bridges.² On the question as to which law the English courts (when they have jurisdiction) apply to maritime torts, we shall first consider the case of the wrong committed within the territorial waters of a foreign state and then the case of a wrong committed on the high seas.

1. TORTS COMMITTED IN TERRITORIAL WATERS.

Torts committed on board ships or by the ships themselves when in territorial waters of a foreign state are subject to the jurisdiction of the English Courts where they claim jurisdiction by virtue of the general maritime law which they administer.³ Otherwise, such torts are treated as having been committed in the foreign country to which those waters belong.⁴ Thus, it would be immaterial that the tort was committed on board a vessel carrying a flag different from that of the sovereign exercising jurisdiction in the territorial waters,⁵ or that a tort against another ship⁶ or in respect of property⁷ other than a ship was at issue.

In general, the rules of substantive law applying to torts committed on board ship or by ships in foreign territorial waters are the same as the general rules governing torts committed in foreign territory as explained above. There might, however, be certain statutory qualifications of these rules. For instance, it appears that the limitations respecting the liability of a tortfeasor contained in the Merchant Shipping Act, 1894, Sect. 503, and the Maritime Conventions Act, 1911, apply also to torts committed in foreign territorial waters.⁸ We shall consider these limitations later.⁹

* ¹ Dicey, 5th ed., p. 271, Rule 61; on Admiralty actions *in rem*, see p. 399, *post*.

² *R. v. Anderson* (1868), L.R. 1 C.C.R. 161.

³ The Tolten, [1946] P. 135, 147.

⁴ *Chung Chi Cheung v. R.* (1938), 55 T.L.R. 184, 187.

⁵ *R. v. Lesley* (1860), 8 Cox C.C. 269, 277; Lindley, J., in *R. v. Keyn* (1876), 2 Ex. D. 63, 95.

⁶ *Dobree v. Napier* (1836), 2 Bing. (N.C.) 781, 796.
⁷ *The Mary Moxham* (1876), 1 P.D. 107, 109; *Carr v. Francis Times & Co.*, [1902], A.C. 176, 178.

⁸ Dr. Lushington in *Cail v. Papayanni*; *The Amalia* (1863), 1 Moo. P.C. (N.S.) 471 and Dicey, 5th ed., p. 781.

⁹ See p. 159, *post*.

2. TORTS COMMITTED ON THE HIGH SEAS.

With respect to torts committed on the high seas, it is necessary, in order to determine the appropriate *lex*, to distinguish whether the tort committed by a person on board one ship resulted in injury to persons or property on board the same ship, or whether the tort by a person on board ship caused injury to an external object, e.g. to another ship or to persons or property not on board the first ship.

A. Torts committed on the high seas on board ship. If a tort is committed on board a ship whilst she is on the high seas and causes injury to persons or property on board the same ship, it would appear that the law of the flag, i.e. the law of the country under whose flag the ship sails takes the place of the *lex loci delicti*.¹

B. Torts committed on the high seas against an external object. With respect to torts committed by persons on ships on the high seas and causing injury to external objects such as other ships,² submarine cables,³ wrecks⁴ or whales in the possession of others,⁵ the English courts will apply the general maritime law as evolved by the English Admiralty Court. This is a considerable departure from the general rules governing foreign torts. In this case, it is sufficient that the wrong is actionable under English municipal law, for the general maritime law forms, of course, part of English municipal law.⁶ In other words, the first requirement of the general principle governing torts committed abroad, namely that the wrong must be actionable according to the law of the place where it was committed, does not apply here. The effect of the departure will be gathered from *The Leon*,⁷ a case which should be compared with *The Mary Moxham*,⁸ which was based on similar facts.

In *The Leon*, a British ship had collided with a Spanish vessel on the high seas. The owners of the British ship brought an action against the owners of the Spanish ship for damages caused by the collision. The defendants pleaded that the law of Spain does not recognise the *respondere superior* rule and that accordingly they were not liable for any negligence on the part of the master and the crew. The plaintiffs demurred to this defence. Sir Robert Phillimore rejected this defence, and observed: "I am of opinion . . . that the law which is applicable here and governs the liability of the defendants in the case is the general maritime law as administered in this country." Consequently the demurrer was sustained.

¹ Dicey, 5th ed., p. 778; Cheshire, 3rd ed., p. 387.

² *The Leon* (1881), 6 P.D. 148; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 536.

³ *Submarine Telegraph Co. v. Dickson* (1864), 15 C.B. (N.S.) 759.

⁴ *The Tubantia*, [1924] P. 78.

⁵ *Aberdeen Arctic Company v. Sutter* (1862), 6 L.T. 229.

⁶ Willes, J., in *Lloyd v. Guibert* (1865), 1 Q.B. 115, 123.

⁷ (1881), 6 P.D. 148. ⁸ (1876), 1 P.D. 107; see p. 148, *ante*.

It will be remembered that the same defence was raised in *The Mary Moxham*.¹ There it succeeded because a trespass to Spanish land was at issue, and, consequently, both the *lex loci delicti* (Spanish law) and the *lex fori* (English law) had to be satisfied. In *The Leon* the defence failed because the Court had to apply English law exclusively.

The law of the flag is entirely disregarded in these cases. This disregard goes so far that the English court will apply English maritime law even to the case of two colliding ships carrying the same foreign flag. This was decided in *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*² In this case, Brett, L.J., said—

Even if I assume these (the two colliding ships)—to have been Dutch ships, it seems to me that, inasmuch as the injury to the plaintiffs was committed . . . on the high seas, which are subject to the jurisdiction of all countries, the question of negligence in a collision raised in a suit in this country is to be tried, not indeed by the common law of England but by the maritime law which is part of the common law of England as administered in this country.

In the United States of America, however, the *Restatement* admits, apparently for reasons of expediency, in the case of all colliding ships flying the same flag an exception in favour of the law of the flag.³

English maritime law is applied not only to the collision of ships on the high seas, but also to collisions on the high seas of a ship with other chattels which are owned or possessed by a person. Thus Willes, J., observed that as far as the law applicable to collisions on the high seas was concerned, he did not see a substantial difference between a collision with a telegraphic cable and a collision with a ship.⁴ The Supreme Court of the United States extended this principle even to the case of a ship colliding on the high seas with an iceberg, a *res nullius*.

In an American case,⁵ the *Titanic*, a British vessel, had collided with an iceberg on the high seas. In an action for damages brought in the United States, the question arose whether the American statutes limiting the liability of the shipowner applied or whether English law governed the case.

The Supreme Court of the United States decided in favour of the application of American maritime law.

¹ (1876) 1 P.D. 107; see p. 149 *ante*.

² (1883), 10 Q.B.D. 521, 537.

³ American *Restatement*, para. 410 (a).

⁴ *Submarine Telegraph Company v. Dickson* (1864), 15 C.B. (N.S.) 759, 779.

⁵ *Oceanic Steam Navigation Co. Ltd. v. Mellor* (1913), 233 U.S. 718.

3. THE STATUTORY LIMITATIONS OF LIABILITY IN CASE OF MARITIME TORTS.

The English legislature has imposed certain statutory limitations on the liability of tortfeasors responsible for maritime torts. These limitations apply regardless of whether the ship which has caused the collision is a British or a foreign ship or whether the collision has occurred on the high seas or in British or foreign territorial waters.

The enactments in question are the Merchant Shipping Act, 1894, Sect. 503 and, further, the Maritime Conventions Acts, 1911, which incorporates the proposals of the Brussels Conference on Collisions and Salvage of 1910. The limitations imposed by the Merchant Shipping Act, 1894, extend to all injuries done on board ship and those occurring in consequence of a collision. The liability of the shipowner is limited to a specified amount assessed in accordance with the tonnage of his ship. The Maritime Conventions Act, 1911, Sects. 1-5 applies only to torts arising out of a collision between two or more ships, but includes injuries done on board ship in consequence of such collision. It permits the apportionment of liability according to the degree of fault exhibited by each of the vessels concerned in the collision and permits an equal apportionment between all the vessels concerned if it is impossible to establish different degrees of fault. It also lays down that, in case of loss of life or personal injury, the owners of the colliding ships shall be liable jointly and severally to the injured person, but that the owners shall have a claim for contribution one against the other according to their respective degrees of fault.

Dicey¹ characterizes these Acts as "a limitation of liability deemed proper as a rule to be applied in every case adjudicated on by English courts and in this sense . . . a *lex fori*."

Dicey, 5th ed., p. 781, note 1.

Division II: The Law of Property

CHAPTER VII

THE LAW OF IMMOVABLES

I. GENERAL PRINCIPLES

1. THE *LEX SITUS*.

All dispositions relating to immovable property are, in principle, governed by the law of the country in which the property is situate (*lex situs*). "No more generally accepted doctrine or one more clearly based upon principle and reason, exists in the whole body of the law."¹ Story, after referring to "the general principle of the common law"

that the laws of the place where such property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them,²

notices the general though not universal³ concurrence of foreign and domestic courts and jurists in this view. Westlake observes that even the Italian Civil Code of 1865, which he considers as the most advanced statute based on the principle of nationality, admits in the case of immovables an exception in favour of the *lex situs*: Art. 7 of the Preliminary Part of the Code provides that immovable property shall be subject to the *lex situs*.⁴

The principle, that all dispositions relating to immovables are subject to the *lex situs*,⁵ has been adopted by English law in a comprehensive manner. Subject to certain exceptions, it extends not only to the voluntary transfer of property *inter vivos*, i.e. the conveyance, but also to so-called general assignments, which are transmissions of property by operation of law. They occur in cases of death, bankruptcy and—sometimes⁶—marriage. This is a remarkable extension of the *lex situs* principle, for it is obviously desirable that all assets transmitted on these occasions should be governed by a single system of law. The English rule, however, results in a diversity of laws being

¹ Beale, "Equitable Interests in Foreign Property" in 20 *Harvard Law Review* 382.

² Story, para. 424.

³ The exceptions are mentioned by Cheshire, 3rd ed., p. 712.

⁴ This provision does not, however, apply to the transmission of immovables in case of succession, see Arts. 8 & 9 of the Italian enactment and *In re Ross*, *Ross v. Waterfield* (1930), 1 Ch. 377, 404; see p. 215, *post*.

⁵ Page Wood, V.C., in *Simpson v. Fogo* (1863), 1 Hem. & Mil. 195, 222.

⁶ See p. 246, *post*.

applicable since movable estate, transmitted by way of general assignment, is subject to the *lex domicilii* of the assignor, whereas the immovables are governed by their respective *leges situs*.

There are various reasons why English law has adopted the *lex situs* doctrine to such an extent. The *situs* is obviously the natural link of connection between the land and a territorial system of law. The application of the *lex situs* is also in accordance with two general principles of the conflict of laws, namely, the principle of territoriality and the vested right doctrine. "If English courts were to determine rights to land . . . by another law than the *lex situs*, our tribunals would, in the first place, be guilty of an indirect encroachment upon the rights of the foreign sovereign, and would, in the second place, often be guilty of a refusal to recognise rights duly acquired under the law of a foreign country."¹ A further reason is indicated by Lord Herschell² in the following *dictum*—

No nation can execute its judgments, whether against persons or movables or real property, in the country of another.

Lord Herschell refers here to the so-called principle of efficacy according to which the Court will refrain from exercising a jurisdiction which it cannot render effective. An additional ground why the English conflict of laws attaches such preponderance to the *lex situs* of the immovable is, it is believed, to be found in the peculiar structure of English internal land law. English land law preserved its intrinsically medieval character until Lord Birkenhead's Law Reform in 1922-5; in 1859, John Stuart Mill³ referred to the methods of conveying real estate as "cabinets of historical curiosities"; in 1879, Maitland, when describing the difficulties with which the student of land law was confronted, observed that the student has to "learn a new language and to acquire wholly new habits of thinking."⁴ The feudal structure of English land law, and the extolled social function attributed to land in the days before the Industrial Revolution,⁵ made it imperative for the English courts to apply English law to English estates to the exclusion of all other legal systems. The concession to the law of a foreign state of exclusive application regarding land situate in that state not only appeared to the English courts as a logical requirement of justice but was also due to their natural aversion to

¹ Dicey, 5th ed., p. 584.

² In *British South Africa Company v. Companhia de Moçambique*, [1893] A.C. 602.

³ Mill, *Dissertations and Discussions*, Vol. I, p. 370.

⁴ Maitland, "The Law of Real Property," in *Collected Papers*, Vol. I, at p. 162.

⁵ Cf. *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895, 936; see p. 167, *post*.

becoming entangled in a foreign body of law which might prove to be of a similar complexity to English land law.

2. DEFINITION, LIMITATION AND SCOPE OF THE *LEX SITUS*.

It will be convenient to define the exact scope of the *lex situs* before examining in detail its application to the conveyance.

A. The classification into immovables and movables. First, it is necessary to remember that the classification of property into immovables and movables, which the English courts have adopted in conflictual issues (in order to arrive at a common basis of understanding with foreign systems of law), as a rule does not coincide with the general classification of property in English law into realty and personalty. These distinctions have been discussed in detail in the general chapter on the definition of a vested right. Here, a reference to the earlier observations may suffice,¹ and it may be recalled that the importance of the conflictual classification can best be gathered from the position of the lease which, in the conflict of laws, is regarded as an immovable whilst under the general classification it is treated as personalty.

B. Qualifications of the *lex situs*. The principle that all incidents of real estate² are governed by the *lex situs* is subject to two classes of exceptions which are both postulated by general principles of the law.

(a) *In case of jurisdiction "in personam."* The cases falling within this group of exceptions have been stated by Wright, J., in *Companhia de Moçambique v. British South Africa Co.*³—

Courts of Equity have, from the time of Lord Hardwicke's decision in *Penn v. Lord Baltimore*,⁴ in 1750, exercised jurisdiction *in personam* in relation to foreign land against persons locally within the jurisdiction in cases of contract, fraud and trust.

In these cases, i.e. in personal relations arising from contract, fraud and trust, the English courts assume jurisdiction and apply a law other than the *lex situs* if the circumstances so demand although the subject matter is foreign land. We shall discuss these cases later,⁵ but it is convenient to indicate here that, of these three cases, those relating to contract and fraud are apparent rather than genuine exceptions.

As regards the first of these cases, a distinction has to be drawn between the contract whereby a person promises to execute a dis-

¹ See pp. 35, 38, *ante*.

² See Lord Langdale, M.R., in *Earl Nelson v. Lord Bridport* (1846), 8 Beav. 547, 572.

³ [1892] 2 Q.B. 358, 364.

⁴ (1750), 1 Ves. Sen. 444.

⁵ See p. 172, *post*.

position relating to land, and the actual conveyance whereby the promise is discharged.¹ The contract creates a personal obligation: if it is broken, then, on principle, the Common Law² admits only a claim for damages. The conveyance, on the other hand, affects the title to the land directly; it operates *in rem* and leads to a change in or limitation upon the ownership of the land. The strict rule of the *lex situs* extends only to the conveyance. Contracts relating to land are subject to different considerations; they are governed by the same rule which applies to contracts in general, namely by the proper law of the contract.³

In the case of fraud, the assertion of jurisdiction *in personam* by the English courts is an application of a much wider principle, namely the ultimate reservation in favour of the public policy of the *forum*, which underlies the whole province of the conflict of laws.⁴ To refuse the application of this overriding principle only for the reason that the fraud was perpetrated in relation to foreign land, would, in the words of Lord Nottingham,⁵ be "a jest put upon the jurisdiction of this Court—i.e. the Court of Chancery—by the common lawyers"; it would be incompatible with the inherent authority of the court.⁶

With regard to the third group of exceptions, the Court of Chancery early assumed jurisdiction over trusts and other equitable interests, though the subject-matter was foreign land, provided that the defendant was amenable to its jurisdiction. The Courts of Equity have justified this inroad into the Common Law rule by the same reasoning by which they justified their jurisdiction in general, but were careful to respect the established limits of the equitable jurisdiction. Thus, Lord Hardwicke, in *Penn v. Lord Baltimore*,⁶ a case concerned with a dispute of land in America, whilst feeling no difficulty in decreeing specific performance of the agreement, refused to enforce a covenant for quiet enjoyment, "for it would be improper to have a decree in this court for quiet enjoyment of lands in America."

(b) *In case of Admiralty jurisdiction.* The special requirements of maritime commerce and the need of uniformity in maritime law have led to a qualification of the *lex situs* where collisions of ships with foreign land installations are in issue. These requirements are referred to by Scott, L.J., in *The Tolten*⁷—

The universality of the world area, over which [the English Admiralty Court] administered justice both civil and criminal, affords a

¹ See p. 127, *ante*.

² Specific performance is an equitable remedy.

³ See p. 50, *ante*.

⁴ In *Arglasse v. Muschamp* (1682), 1 Vern. 75, 77.

⁵ Professor Gutteridge in 4 *Cambridge Law Journal*, 1936, at p. 20.

⁶ (1750), 1 Ves. Sen. 444, 447.

⁷ [1946] P. 135, 154.

striking contrast to the locally restrictive rules of common law jurisdiction.

We shall consider the jurisdiction of the English Court of Admiralty later.¹

C. The application of the *lex situs* to choice of law and jurisdiction. To ascertain the true scope of the rule of the *lex situs*, it is, further, necessary to recall that the conflict of laws is concerned with two fundamental quests, namely that connected with the choice of law and that concerned with the competing claims to jurisdiction of the English and foreign courts. In the province of the law of immovables, the existence of these two quests is sometimes ignored. The principle that all incidents of an immovable are subject to the *lex situs* of the immovable pertains both to the choice of law and to the problem of jurisdiction. It follows that if a title to, or possession of, foreign land is in issue, the English courts may not content themselves with applying the *lex situs* as a matter of choice of law but may, as a matter of jurisdiction, refrain from taking cognizance of the suit at all. These two aspects of the rule of the *lex situs* were indicated by Wright, J., in *Companhia de Moçambique v. British South Africa Co.*² in the following passage—

Subject to qualifications depending on personal obligations, it is a general principle of jurisdiction, that title to land is to be directly determined, not merely according to the laws of the country where the land is situate, but by the courts of that country.

In order to give full effect to the refusal to accept jurisdiction in cases where the title to, or the possession of, foreign land is in issue, the English courts are further wont to refrain from taking cognizance of cases founded upon trespasses to foreign land. The obvious reason for the attitude of the English courts is that an action for trespass is sometimes employed in order to try by indirect means the title to the land in question. It will be remembered that, in English internal law, the old action for trespass in ejectment was regularly used to obtain a decision on the ownership of the land alleged to have been leased to John Doe. To avoid such an evasion of the *lex situs* in the conflictual sphere, the English courts, in cases of trespass to foreign land, will usually admit a suit only if it is beyond doubt that no title to, or possession of, foreign land is in dispute. If, however, the ownership of the land is not in issue and the defendant in an action for trespass to foreign land denies liability for other reasons (e.g. because he maintains that the *respondeat superior* rule is unknown to the *lex situs*), the English courts may be expected to

¹ See p. 399, *post*.

² [1892] 2 Q.B. 358, 366.

assume jurisdiction, provided that the regular requirements for their jurisdiction have been satisfied. Then, however, the question of the choice of law arises, and the English courts will found their decision on the *lex situs* in question. These rules may be illustrated by *Companhia de Moçambique v. British South Africa Co.*¹ showing the operation of the *lex situs* in the sphere of jurisdiction, and *The Mary Moxham*² showing its operation as far as the choice of law is concerned.

In *Companhia de Moçambique v. British South Africa Co.*,¹ the Portuguese company complained that the defendants had committed trespasses upon their land situate in Africa and had evicted them and assaulted their servants. The plaintiffs asked, *inter alia*, for a declaration of title to the land in question and further for damages for the alleged trespass.

The defence was, in short, that the English Court had no jurisdiction to try either claim. Before the Court of Appeal and the House of Lords, the plaintiffs relinquished their claim for a declaration of title, and the main issue argued was whether the courts should entertain an action for trespass to land in a case where the title was disputed.

One of the arguments in favour of the plaintiffs was that, prior to the Judicature Acts, the English courts had refused jurisdiction over such issues solely on the technical ground that no local venue could be said because local venues could not be fictitious (as venues in transitory actions often were). The House of Lords dismissed this argument. Lord Herschell, L.C., said: "I have come to the conclusion that the grounds upon which the Courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before."³

In the result, therefore, the House of Lords held that, for reasons of substantive law, the English courts did not entertain actions relating to the title to foreign land.

The attempt of the plaintiffs to evade this conclusion by founding their claim on trespass, was exploded by Wright, J., in a judgment that received the approval of the House of Lords. Wright, J., said: "Assuming that an action can be entertained here for damages to foreign land, where no question of title is raised, it would seem that, when an issue of title is directly raised, either by the statement of claim or by the statement of defence, the Court must be . . . incompetent to try that issue."

If, however, the dispute regarding the trespass to foreign land does not raise an issue relating to title, no reason exists why the English courts should refuse their jurisdiction, provided that the general conditions respecting their competence are satisfied. Thus, where a ship is sued *in rem* for damage done to foreign land installations,

¹ [1892] 2 Q.B. 358; [1893] A.C. 602.

² (1876), 1 P.D. 107; see p. 149, *ante*. The true distinction between the two cases does not consist in the fact that in *The Mary Moxham* the parties had submitted to the jurisdiction of the English courts; such submission would not confer jurisdiction on an English court in a dispute affecting the title to foreign land; the decisive point is that in *The Mary Moxham* no dispute as to title was in issue.

³ At p. 629.

⁴ At p. 368.

normally no question of title to foreign land is involved and the rule in the *Moçambique* case is no bar to the exercise of the jurisdiction by the English courts.¹ In this connection, the following observations of Somervell, L.J., in *The Tolten*² should be noted—

In the *Moçambique* case there was a conflict as to title between plaintiff and defendant. Although, as I have stated, I think the rule as laid down by the House of Lords covers cases where there is no such conflict, it is undoubtedly the dispute as to title between plaintiff and defendant which is the origin of the rule. Here we are dealing with a special procedure, namely, the enforcement of maritime liens by proceedings *in rem* under Admiralty jurisdiction. We are dealing with a class of claim in which any issue as to title is very unlikely, and a dispute as to title, in which the defendant owners of the colliding vessel are themselves claiming the title as against the plaintiffs, is so improbable that in my view its theoretical possibility can be disregarded.

In accordance with the rule against the assumption of jurisdiction involving a determination of the title to, or possession of foreign land, the English courts have refused to entertain actions for the partition of foreign land,³ for ejectment from a foreign island,⁴ for the possession of land abroad,⁵ for a claim to a title of a foreign house or the proceeds of its sale,⁶ and for compulsory contributions levied by a foreign municipal council for improvements of property in its area.⁷

To the rule that the English courts will not take cognizance of disputes involving the decision of title to foreign land, a broad exception exists in the case of equitable jurisdiction *in personam*. In this case, the English courts will not only assume jurisdiction but will also apply English law to the foreign land. Actions concerning an equitable or personal interest in land may involve incidentally a decision on the title to foreign land, but such an incident would not bar the jurisdiction *in personam* of the English courts. Scott, L.J., said in *St. Pierre v. South American Stores*⁸ with reference to Lord Herschell's speech in the *Moçambique* case⁹—

By these words I understand him to have meant that it is the action founded on a disputed claim of title to foreign lands over which an English court has no jurisdiction, and that where no question of title arises, or only arises as a collateral incident of the trial of other issues, there is nothing to exclude the jurisdiction.

¹ *The Tolten* [1946] P. 135; *The Golaa* [1926] P. 103.

² [1946] P. 135, 166; see p. 399, *post*.

³ *Cartwright v. Pettus* (1676), 2 Ch. Cas. 214.

⁴ *Skinner v. East India Company* (1667), 6 State Trials 710.

⁵ *Doulson v. Mathews* (1792), 4 T.R. 503; *Roberdeau v. Rous* (1738), 1 Atk. 543; *Re Holmes* (1861), 2 J. & H. 527.

⁶ *In re Hawthorne* (1883), 23 Ch. D. 743, 746.

⁷ *Sydney Municipal Council v. Bull*, [1909] 1 K.B. 7, 12.

⁸ [1936] 1 K.B. 382, 397.

⁹ [1893] A.C. 602.

II. APPLICATION OF THE PRINCIPLE OF THE *LEX SITUS* TO THE CONVEYANCE

We have now to examine in detail the application of the *lex situs* rule to dispositions relating to real estate. Our observations are confined to the conveyance and do not concern the cases relating to the transmission of immovables by general assignment which will be treated in a later chapter. As, however, the principle underlying the application of the *lex situs* in both provinces is essentially the same, a reference to the latter decisions may from time to time be convenient.

It is intended to consider the application of the *lex situs* to—

1. the capacity to convey land,
2. the form of the conveyance,
3. the essential validity of the conveyance.

These observations will be supplemented by a few remarks on—

4. the effect of prescription on the title to immovables.

1. CAPACITY TO CONVEY LAND.

The capacity of the parties to a conveyance is governed by the *lex situs* of the immovable in question. This rule applies equally to the capacity to create or transfer a legal or equitable estate in an immovable and to the capacity to acquire such estate. It extends to the complete alienation of land as well as to transactions concerning mortgages¹ and leases.²

A celebrated case, concerned with the capacity of a person to take English land as heir-at-law, was that of *Birtwhistle v. Vardill*.³

The plaintiff was an illegitimate child born in Scotland. Several years after his birth, his mother married his father. According to Scottish law the plaintiff became legitimated by the subsequent marriage of his parents; but at that time such legitimation was unknown to English law. The domicil of the plaintiff's father both at the time of the plaintiff's birth and at the subsequent marriage was Scotland.

The plaintiff's father died leaving the plaintiff certain lands situate in England. The plaintiff claimed to be entitled to the English lands as the heir-at-law.

According to English law⁴ (as the *lex situs* of the land) the heir to English land must have been born in lawful wedlock, whilst according to Scottish law (as the *lex domicilii* of the father) a person legitimated by subsequent marriage was considered as the lawful heir to land. If

¹ *Waterhouse v. Stansfield* (1852), 10 Hare 254.

² It should, again, be remembered that leaseholds are, with certain exceptions, considered immovables in the conflictual classification.

³ (1839-40), 7 Cl. & F. 895. See also the American case *United States v. Fox* (1876), 94 U.S. 315.

⁴ As it then stood.

English law governed the issue, the plaintiff was incapable of taking the land, whereas Scottish law accorded him such capacity.

The House of Lords were of opinion that English law, as the *lex situs*, applied and that, in consequence, the plaintiff was incapable of inheriting English land.

Tindal, C.J., stated the law¹ in the unanimous opinion of the Judges, which was accepted by the House of Lords, as follows—

“The question still recurs, whether, for the purpose of constituting an heir to land in England, something more is not necessary to be proved on his part than such legitimacy; and if we are right in the grounds on which we have rested the first point, another step is necessary, namely, to prove that he was born after an actual marriage between his parents; and if this be so, then upon the distinction admitted by all the writers on international law, the *lex loci rei sitae* must prevail, not the law of the place of birth.”

Some legal systems declare certain corporations, persons² or charities to be incapable of acquiring land; other systems restrain the alienation of particular land. It will be convenient to consider restraints of all kinds (whether attaching to capacity or extending to the essential validity of the conveyance) later when the essential validity of the conveyance is examined.

2. FORM OF THE CONVEYANCE.

“According to the common law . . . no conveyance or transfer of land can be made, either testamentary or *inter vivos*, except according to the formalities prescribed by the local law.”³ The solemnities and forms provided by the different systems of law for the conveyance vary, but, without exceptions, the form prescribed by the *lex situs* has to be observed.

Thus, in *Adams v. Clutterbuck*,⁴ a lease relating to grouse shooting rights in Scotland was granted in an unsealed document; the grant was made between Englishmen in England.

According to Scottish law, which was the *lex situs* of the land, the grant was good; according to English law it was not valid because where a profit *à prendre* is created by express grant, a deed is required.

In an action brought on a covenant in the grant, the Court held that Scottish Law governed the issue and that, consequently, the grant was valid.

On the same grounds, it has been held that if a foreign *lex situs* prescribes that a mortgage has to be executed before the court,⁵ or

¹ At p. 937.

² *United States v. Fox*, *supra*; *Calvin's Case* (1608), 7 Rep. 2a.

³ Story, p. 435.

⁴ (1883), 10 Q.B.D. 403.

⁵ *Waterhouse v. Stansfield* (1851), 9 Hare 234; (1852), 10 Hare 254; (law of Demerara).

a conveyance has to be registered ¹ or a verbal transfer of land is valid,² the disposition of the land must comply with these requirements.

Similarly, dispositions relating to English land have to satisfy the form prescribed by English law.³ For instance, if an Englishman temporarily residing at Nice wishes to transfer his land in Yorkshire to another Englishman, who is also on holiday in France, the transfer has to be effected in the form of a deed, otherwise it will be void for want of the form prescribed by the Law of Property Act, 1925, Sect. 52. In the same way, a will devising English lands has to comply with the form of the Wills Act, 1837. In the case of a bequest of English leaseholds an exception exists, however, under Lord Kingsdown's Act, 1861, which relates to personalty ⁴ and lays down that, if certain conditions are satisfied, a will made by a British subject is valid though not made in the form of the *lex situs*. This Act will be considered in detail later, when the form of testamentary dispositions ⁵ is being examined.

3. ESSENTIAL VALIDITY OF THE CONVEYANCE.

The *lex situs* governs all questions pertaining to the essential validity and interpretation of the conveyance.

In this connection, the *lex situs* determines, first, "the extent of the interest to be taken or transferred."⁶ The nature of the estate created or transferred by the deed has to be ascertained on the basis of that law. Moreover, the question whether the intended estate can be created at all has also to be determined by the *lex situs*. "Whether a life estate or fee passes, or whether a legal or an equitable estate passes as a result of delivering the deed is determined by the law of the *situs* of the land."⁷

Secondly, the *lex situs* determines the effect of the transfer, its validity or invalidity. Almost every system of law has surrounded the alienation and acquisition of land with special precautions, and many systems have imposed restraints on the transfer of land. A conveyance of land contravening restrictions of this kind prescribed by the law of the *situs* is void.⁸

¹ *Hicks v. Powell* (1869), L.R. 4 Ch. 741; *Norton v. Florence Land & Public Works Co.* (1877), 7 Ch. D. 332.

² *Doe d. Seebkristo v. East India Co.* (1856), 10 Moore 140.

³ *Coppin v. Coppin* (1725), 2 P. Wms. 292.

⁴ *In re Grassi: Stubbsfield v. Grassi*, [1905] 1 Ch. 584, 590; *Re Lyne's Settlement Trusts*, [1919] 1 Ch. 80; *Pepin v. Bruyère*, [1900] 2 Ch. 504; *Pike v. Hoare* (1763), 2 Ed. 182.

⁵ See p. 230, *post*.

⁶ Story, s. 445.

⁷ 2 Beale, 942-3.

⁸ *Waterhouse v. Stansfield* (1851), 9 Hare 234.

Restraints of this character which form part of the English law, are, for instance, the rule against perpetuities,¹ or the rule regarding accumulations as laid down by the *Thellusson Act*² or the rules against conveying land to unlicensed corporations or charities.³ Dispositions of English land not conforming with these enactments or rules are considered as void by the English courts though they might be valid according to the law of the place where the disposition was transacted, or the grantor or testator was domiciled. The conflictual rules relating to accumulations and perpetuities were laid down in *Freke v. Lord Carbery*⁴ and in *Re Grassi*.⁵ In the first of these cases, Lord Selborne, L.C., said—

This leasehold property in Belgrave Square is part of the territory and soil of England, and the fact that the testator had a chattel interest in it, and not a freehold interest, makes it in no way whatever less so. An Act of Parliament, limiting the period for which accumulations are permitted, has as much force in Belgrave Square, and upon every part of the property in the land of Belgrave Square as it has in any other part of England; and, for that purpose, it appears to me to be totally immaterial what is the quantity of interest dealt with by the will.

Another illustration of the rule that dispositions concerning English land are void if contravening the English restraints on the transfer of property is provided by the statutes limiting the transfer in mortmain or to charitable uses. The statutes apply to *all* immovables situate in England; and it is immaterial whether the charities mentioned in the will are English or foreign institutions. The length to which the courts will go in upholding this rule is illustrated by the case of *In re Dawson*.⁶

In this case, a testator had, among other assets, bequeathed a debenture issued by an English Company to the use of two English Hospitals. The debenture was secured by the charge on all real and personal property of the company. The company possessed wide tracts of land in South Australia and dealt principally in these lands. The only immovable interest in England was a short term lease of a small office in the City of London which was, as the report says, "of no appreciable value."

The laws of South Australia did not restrain the transfer of immovable interests to charitable uses.

¹ See now Law of Property Act, 1925, s. 163.

² Accumulations Act, 1800; Accumulations Act, 1892; see now Law of Property Act, 1925, ss. 164-6; see p. 233, *post*.

³ See now Settled Land Act, 1925, ss. 29 (4), 119, and Sched. V.

⁴ (1873) L.R. 16 Eq. 461.

⁵ *In re Grassi*: *Stubbsfield v. Grassi*, [1905] 1 Ch. 584.

⁶ [1915] 1 Ch. 626; other examples are *Curtis v. Hutton* (1808), 14 Ves. 537; *A.G. v. Mill* (1827), 3 Russ 328; (*aff.*) (1831), 2 Dow & Cl. 393; *Duncan v. Lawson* (1889), 41 Ch. D. 394.

Since the testator had died before the coming into force of the Mortmain & Charitable Uses Act, 1891, the issue had to be decided on the basis of the earlier Act of 1888; this Act invalidated generally the transfer to charitable uses of all "tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land."¹

The debenture, as far as it was charged on the lease of the office in London came within this Act and was, therefore, invalid. The Court went, however, further and held that the whole bequest was thereby annulled because the Australian part of the charge was not severable from the English part.

In accordance with the same principle, land situate abroad is subject only to the restrictions imposed by the law of the territory in question² and not to the English restraints, even if the beneficiary is an English charity. Further, if a gift of money is made to an English charity with a direction to purchase English land for charitable uses, the gift is valid unless it infringes the *lex domicilii* of the testator at the time of his death; the English Mortmain Acts would not invalidate such a gift. Thus, in a case where a person domiciled in Victoria (Australia) had made a gift of money to the City of Canterbury with a direction to purchase land and to erect a public library on it, the Privy Council advised that "this will is not affected by English law. It is a valid will binding on his executors; and a Victorian Court of Justice should direct them to perform their obligation."³

If a gift of English immovables by a foreign testator is void for the reason that it infringes an English restraint upon alienation, the question arises which law governs the distribution of the immovables *ab intestato*. Is it English law as the *lex situs*, or the law of the domicile of the testator? It was held in *Duncan v. Lawson*⁴ that this question has to be answered on the basis of the *lex situs*.

4. PRESCRIPTION.

The law of the country where the land is situate, determines, further, how far a title to the land is acquired or lost by effluxion of time. It is essential to distinguish here between the legal rules pertaining to prescription and those governing the limitation of actions. The latter constitute a valid defence against an action. They bar the

¹ The Act of 1891 contains an express exemption in favour of debentures secured on land; to-day such a bequest would not be invalid.

² *In re Hoyles: Row v. Jagg*, [1911] 1 Ch. 179, the Mortmain Act, 1736, was applied for the reason that it was the *lex situs* of Ontario; it was, from the point of doctrine, mere coincidence that the laws of Ontario and of England were to this extent identical.

³ *Mayor, Aldermen and Citizens of Canterbury v. Wyburn and The Melbourne Hospital*, [1895] A.C. 89, 97.

⁴ (1889), 41 Ch. D. 394.

remedy after the expiration of a fixed time ; they are of a procedural character and are, therefore, governed by the *lex fori*.¹

The rules relating to prescription, on the other hand, lay down whether the title as such is extinguished² or a new title is acquired by effluxion of time ; they form part of the substantive law ; they vest the ownership or the right to possession in the person in whose favour they apply and deprive the person against whom they operate of such ownership or right. Being rules of substantive law, they are governed by the *lex situs* of the immovable in question.

Thus, in *Beckford v. Wade*,³ the Privy Council, as Court of Appeal for Jamaica, advised that the prescription of land situate in Jamaica was governed by Jamaican law. Sir William Grant, M.R., observed in the judgment : " This possessory law—i.e. the law of the Island of Jamaica—is framed upon a different principle from our Statute of Limitations. It is rather of the nature of the *Usucapio* of the Roman Law, or the positive prescription of the law of Scotland. It does not bar the legal remedies, if the parties do not proceed within a certain time : but it converts a possession for seven years under deed, will, or other conveyance, into a positive absolute title, against all the world."

III. JURISDICTION OF THE ENGLISH COURTS IN PERSONAM

The principle, that dispositions relating to immovable property are governed by the *lex situs*, is subject to exceptions which have already been surveyed in the general examination of the principle.⁴ There reference was made to a dictum of Wright, J., in *Companhia de Moçambique v. British South Africa Co.*⁵ that English courts of equity will exercise jurisdiction *in personam* in cases of contract, fraud and trusts relating to foreign land.

The common feature of these exceptions, which at the same time provides the explanation for their admission, is indicated by Parker, J., in *Deschamps v. Miller* ⁶—

Without attempting to give an exhaustive statement of these exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation. . . .

The personal character peculiar to these exceptions is also emphasised

¹ See Dicey, 5th ed., p. 602 ; the rule that the limitation of an action concerning immovables is subject to the *lex fori*, and not to the *lex situs* is, however, not yet quite settled ; see *Hicks v. Powell* (1869), 4 L.R. Ch. 741.

² The Limitation Act, 1939, provides that at the expiration of the period prescribed by the Act for a person to bring an action to recover land, the title to the land shall be extinguished (Sect. 16) ; see *Young v. Clarey* (1948), 64 T.L.R. 93.

³ (1805), 17 Ves. Jun. 87 ; see also *Pitt v. Dacre* (1876), 3 Ch. D. 295 ; *Re Peat's Trusts* (1869), L.R. 7 Eq. 302.

⁴ [1892] 2 Q.B. 358, 364.

⁵ See p. 162, *ante*.

⁶ [1908] 1 Ch. 856, 863.

by Lord Hardwicke in *Penn v. Lord Baltimore*¹ in the following passage—

The conscience of the party was bound by this agreement; and being within the jurisdiction of this Court which acts *in personam*, the Court may properly decree it as an agreement, if a foundation for it.

The following observations of Scott, L.J., in *St. Pierre v. South American Stores Ltd.*,² are to the same effect.

Where the relief asked for could be given by enforcing a personal obligation arising out of express or implied contract, so as to raise an equity, the Court did not hesitate to entertain jurisdiction.

1. REQUIREMENTS FOR THE JURISDICTION OF THE ENGLISH COURTS IN PERSONAM.

Before entering into a discussion of the three topics mentioned by Wright, J., in the *Mozambique* case, it is pertinent to state the general requirements which must be satisfied before an English court will entertain a suit *in personam* relating to foreign land.

A. The defendant must be amenable to the ordinary jurisdiction of the English courts. The first of these requirements is that the defendant must be amenable to the ordinary jurisdiction of the English courts. It must be possible to serve a writ or notice of the writ on the defendant in accordance with the English law of procedure. The defendant is subject to the jurisdiction of the English courts if he is either personally present within the jurisdiction or if leave to serve a writ out of jurisdiction has been granted by a judge (Rules of the Supreme Court, 1883, Order 11). Both alternatives, the older original jurisdiction and the modern "assumed" jurisdiction, enable the English courts to exercise the jurisdiction *in personam* with respect to foreign lands; in particular, the assumed jurisdiction is of no less value in this connection than the original jurisdiction. Thus, Romer, L.J., said in *Re Liddell's Settlement Trusts*³—

the moment a person is properly served under the provisions of Order 11, that person, so far as the jurisdiction of this Court is concerned, is precisely in the same position as a person is in this country.

B. A personal relationship must exist between the parties. The second requirement⁴ is that a personal bond must connect the parties.

¹ (1750), 1 Ves. Sen. 444, 447.

² [1936] 1 K.B. 396.

³ [1936] 1 Ch. 365, 374. This case was not concerned with the equitable jurisdiction relating to foreign land.

⁴ I am following here Professor Beale's classification in 20 *Harvard Law Review* 387-92.

The bond may originate in contract, fiduciary relationship, unconscionable conduct or in a similar cause. English courts will not, by their decisions, affect the disposition of foreign land directly, but only through the medium of a person,¹ and for this reason it is necessary that some personal obligation should bind the defendant. In the absence of such an obligation, the English courts will refrain from exercising their equitable jurisdiction.²

Thus in *Deschamps v. Miller*,³ one Jean Deschamps, in consideration of his contemplated marriage, had concluded a marriage settlement. Deschamps and his wife Marie were both resident in France. The marriage settlement provided that a community of goods in a form recognised by French law should exist between the spouses; such community extended also to property acquired by either spouse after the conclusion of the agreement.

Later, Jean Deschamps went to India and there he went through a bigamous marriage ceremony with one Cecilia Taylor. Deschamps then settled certain property, including real estate at Madras, in favour of Cecilia Taylor and her relations.

After the death of Deschamps, his son Thomas born of his marriage to Marie, claimed a share in the land in Madras; he maintained that the land was after-acquired property within the meaning of the marriage contract between his parents and fell, therefore, under the community of goods. The trustees of the Indian settlement of Deschamps contested the claim.

The preliminary issue was whether the parties were connected by a personal bond conferring jurisdiction on the English courts to act *in personam*. Parker, J., after having stated the principles on which the Court acts in the exercise of its jurisdiction *in personam*, came to the conclusion that the issue was actually a dispute as to the title to the Indian land which had to be decided exclusively by Indian courts according to Indian law as the *lex situs*. "There is no obligation on the part of the defendants to the plaintiff based on any contract, fiduciary relationship, fraud or other unconscionable conduct. Such obligation, if any, as exists depends, in my opinion, on the Indian law relating to immovables, and on that alone." For these reasons the Court refused to entertain the action.

Whether a personal obligation exists between the parties is sometimes not easy to say. The discretion, which is inherent in the exercise by a court of its equitable jurisdiction, imports an element of indefiniteness and even uncertainty for litigants.

C. The privity of such personal relationship must run from the defendant to the plaintiff. The third requirement is that "the obligation violated must have run from the defendant to the plaintiff."⁴ If *A* stands in a personal relationship to *B* as regards a particular

¹ Lord Cottenham, L.C., in *Ex parte Pollard* (1840), Mont. & Ch. 239, 251.

² *In re Hawthorne* (1883), 23 Ch. D. 743; *Deschamps v. Miller*, [1908] 1 Ch. 856.

³ [1908] 1 Ch. 856.

⁴ Beale, in 20 *Harvard Law Review* 390.

immovable and *B* alienates the immovable to a third person, *C*, who is neither party nor privy to an unconscionable act against *A*, the latter is not entitled to claim relief against *C*.¹

As early as 1796, Sir Richard Arden, M.R., observed in *Cranstoun v. Johnston* ²—

It is said, what if the sale had been to a third person? I am glad I have not to determine that. A third person might have a great deal more to say than this defendant can.

The rule indicated by Sir Richard Arden was definitely established in *Norris v. Chambres*.³

The facts of this case were summed up by Sir John Romilly, M.R., as follows: "John Sadleir agrees with Michael Simons, a Prussian, resident in Prussia, to buy from him an estate in that country, and pays him part of the purchase money. Simons having received this money repudiates the contract, and sells the estate to a stranger."

The successor of John Sadleir (who had died) sued the stranger praying, in essence, for a declaration that the plaintiff had a lien on the estate, that the defendant had purchased the land subject to the plaintiff's lien and was constructive trustee for the plaintiff.

Sir John Romilly, M.R., decided in favour of the defendant on the ground that the defendant was not bound by a personal obligation to the plaintiff and that consequently the English courts had no jurisdiction *in personam*.

With reference to *Penn v. Baltimore* ⁴ and similar cases, Lord Romilly observed: "On examining them, I find that in all of them a privity existed between the plaintiff and defendant; they had entered into some contract or some personal obligation had been incurred moving directly from the one to the other." He then continued: "In this case, I cannot find that anything of this sort exists."

So much for the buyer's claim against the third person. With respect to the vendor of the land the M.R. declared that a clear privity existed between them and that this case was quite different from the suit against the stranger.

Lord Campbell, L.C., affirmed the decision of the M.R.⁵

If, on the other hand, privity exists between the plaintiff and the third person—e.g. if the third person himself acted in an unconscionable manner, the courts will not hesitate to assume their jurisdiction *in personam*.

¹ *Martin v. Martin* (1831), 2 R. & M. 507; *Norris v. Chambres* (1861), 29 Beav. 246; (1861), 3 De G.F. & J. 583; *Norton v. Florence Land & Public Works Co.* (1877), 7 Ch. D. 332; *Mercantile Investment & General Trust Co. v. River Plate Trust, Loan & Agency Co.* (1892), 2 Ch. 303.

² (1796), 3 Ves. Sen. 170.

³ (1861), 29 Beav. 246; aff. (1861), 3 De D.F. & J. 583. See also *Martin v. Martin* (1831), 2 R. & M. 507; *Norton v. Florence Land & Public Works Co.* (1877), 7 Ch. D. 332.

⁴ (1750), 1 Ves. sen. 444.

⁵ (1861), 3 De G.F. & J. 583.

Thus, in *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan and Agency Co.*,¹ an American company owned land in Mexico and had granted an equitable charge on the land in favour of some debenture holders. Later the American company conveyed the Mexican land to an English company which had express notice of the charge and had promised to redeem it.

The English company had negotiated the transfer subject to the rights of the debenture holders in Mexico, but the charge itself was registered by the debenture holders subsequent to the registration of the transfer in favour of the English company.

In an action by the holders of the debentures against the English company, the plaintiffs claimed a declaration that they had a first charge on the Mexican land in accordance with the trust deed.

North, J., gave judgment in favour of the plaintiffs because it would be unconscionable if the defendants repudiated an obligation of which they had express notice and which they had consented to honour. Here, privity existed between the plaintiffs and the third party.

D. The decree of the English courts has no extra-territorial effect.

The fourth condition which must be satisfied if the English courts are to exercise their equitable jurisdiction is that the order which they are asked to pronounce must be effective within the English jurisdiction.

The English courts will abstain from making a decree which cannot be enforced by them. Thus Lord Cottenham, L.C., said in *Ex parte Pollard* ²—

If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to the act.

Lord Campbell's observations in *Norris v. Chambers* ³ are to the same effect—

An English court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the intervention of a foreign court, and which in the country where the lands to be charged by it lie would probably be treated as *brutum fulmen*. I do not think that the Court of Chancery would give effect to a charge on land in the county of Middlesex so created by a Prussian Court sitting at Duesseldorf or Cologne.

The last passage of Lord Campbell's *dictum* provides an answer to the question sometimes mooted whether the English courts would recognise a decree *in personam* of a foreign court with respect to English land. Such foreign decrees have only personal effect; they attach only persons or goods within their jurisdiction. English courts would, therefore, refuse to enforce such decrees because the

¹ [1892] 2 Ch. 303.

² (1840), Mont. and Ch. 239.

³ (1861), 3 De G.F. & J. 583, 584.

English land is outside the territorial jurisdiction of the foreign courts. In short, the personal jurisdiction has no extra-territorial effect; the English courts do not attribute such effect to their orders nor would they concede it to decrees of foreign courts.¹

2. EXAMPLES OF THE JURISDICTION *IN PERSONAM*.

We have now to examine the cases in which the English courts will exercise their jurisdiction *in personam* with respect to foreign immovables.

In each of these cases the four conditions precedent to the application of the jurisdiction *in personam*, which we have just enumerated, must be satisfied.

It will be remembered that according to Wright, J.'s *dictum* in the *Mozambique* case, the instances of the jurisdiction *in personam* can be divided into cases of contract, fraud and equitable interests. It should, however, be added that the enumeration is illustrative rather than exhaustive and that it could be supplemented by other cases based on "some personal obligation" between the parties.

A. Contracts relating to immovables. It has been explained earlier² that contracts relating to land are not subject to the same rigid principle of the *lex situs* as applies to the transfer or transmission of immovables but are governed by the elastic rule of the proper law of the contract. It has, further, been stated that the proper law of a contract relating to land has to be ascertained on the basis of a presumption in favour of the *lex situs*, but that, if the circumstances so demand, this presumption is as rebuttable as all presumptions designed to assist in the determination of the proper law. The operation of the presumption in favour of the proper law has been illustrated by the case of *Bank of Africa Ltd. v. Cohen*,³ a case concerned with the capacity of a married woman to agree to mortgage land in South Africa. The flexibility of the proper law doctrine has been exemplified by *British South Africa Co. v. De Beers Consolidated Mines Ltd.*,⁴ where it was held that an English contract of loan embodying the grant of a diamondiferous mining licence in Africa was governed by the *lex loci contractus* and not by the *lex situs*; that the grant of the licence was in the nature of an equitable charge; and that a clause providing for the continuation of the licence after the redemption of the debt was void as a clog on the equity of redemption.

¹ See D. M. Gordon, "The converse of *Penn v. Lord Baltimore*" in 49 *L.Q.R.* (1933), 547. ² See p. 127, *ante*. ³ [1909] 2 Ch. 129; *ante*, pp. 128-9.

⁴ [1910] 1 Ch. 354; [1910] 2 Ch. 502; [1912] A.C. 52; *ante*, p. 129.

Another illustration of a contract relating to foreign land enabling the English courts to exercise their jurisdiction *in personam* is provided by *Penn v. Lord Baltimore*.¹

In this case, the parties had entered into an agreement to settle certain controversies regarding the title to the districts of Maryland and Pennsylvania in America and to draw and fix boundaries between these territories.

The plaintiff filed a bill for specific performance of the agreement and for quiet enjoyment according to the agreement.

Lord Hardwicke, L.C., held that the Court had jurisdiction to decree specific performance because the contract of the parties affected the "conscience" of the defendant who was personally present within the jurisdiction of the Court. The Court refused, however, to decree quiet enjoyment of the lands in America² because this would have affected the possession of foreign land.

On the same principle, the English courts asserted their jurisdiction with respect to the obligations of an English company which had guaranteed the payment of rent due from tenants of Chilean land.³

A further illustration of the application to foreign land of the contractual rule rather than the *lex situs* is provided by *Re Anchor Line (Henderson Brothers) Ltd.*⁴

In this case a limited company registered in England was the owner of land in Scotland. The company had executed a floating charge at Glasgow in favour of a Scottish bank. The charge was registered in England.

The charge was unenforceable according to Scottish law because it had not yet "crystallised."

The issue was whether the charge was valid.

Luxmoore, J., decided in favour of the validity of the charge. He said: "When an English company possesses land abroad and purports to charge it by way of floating charge, the charge, putting it at its lowest, amounts to an agreement to charge that land, and is a valid equitable security according to English law."

This decision does not, it is believed, permit the inference that the English courts would interpret every kind of conveyance relating to foreign land as a contract to convey the land. It should be noted that, in the *Anchor Line* case, the disposition in question was designed to create an equitable interest, namely a floating charge. This fact certainly assisted the Court in its conclusion to interpret the charge contained in the debenture as an agreement to grant a charge.⁵

¹ (1750), 1 Ves. Sen. 444.

² See p. 163, *ante*.

³ *St. Pierre v. South American Stores Ltd.*, [1936] 1 K.B. 382.

⁴ [1937] 1 Ch. 483.

⁵ Sometimes *De Nicols v. Curlier* (No. 2) [1900] 2 Ch. 410, is quoted as an illustration of the personal jurisdiction of the English courts over foreign lands. However, the point decided in that case is merely that the Statute of Frauds

B. Fraud relating to immovables. The second group of cases representing an exception from the strict application of the *lex situs* to foreign land deals with instances where fraud or other unconscionable demeanour is alleged. Once it is established that the defendant has acted unconscientiously, the English courts will not accede to the argument that such demeanour related only to foreign land. It has already been observed that this exception is the outcome of the fundamental maxim that the courts of the *lex fori* will maintain their inherent authority against any attempts to use them as instruments of injustice. The case of *Cranstown v. Johnston*¹ illustrates these principles.

In this case an award was made that the plaintiff should pay a certain sum of money at Lloyd's Coffee House. At the time when the money became due the plaintiff was abroad and was consequently not in a position to discharge the obligation.

Thereupon the defendant instituted proceedings against the plaintiff in the courts of the island of St. Christopher where the plaintiff had a valuable plantation. The defendant, after having obtained judgment against the plaintiff who was absent from the island, acquired the land for an entirely inadequate consideration by way of execution. Subsequently, the plaintiff offered the defendant payment of the debt against the release of his estate in St. Christopher; and on the refusal of the defendant, he filed a bill in equity.

Sir Richard Arden, M.R., decided in favour of the plaintiff: "This Court cannot act upon the land directly, but acts upon the conscience of the person living here. . . . I have no difficulty in saying, which is all I have to say, that this creditor has availed himself of the advantage he got by the nature of those laws to proceed behind the back of the debtor upon a constructive notice which could not operate to the only point to which a constructive notice ought, that there might be actual notice without wilful default: that he gained an advantage, which neither the law of this nor of any other country would permit."

C. Trusts relating to immovables. Regarding equitable interests, it is first necessary to indicate the exact scope of this exception from the strict *lex situs*.²

The exception does not apply to the creation of equitable interests. The creation of trusts or other equitable interests depends on the *lex situs* in the same way as the creation of a legal estate.

(including the exemptions admitted by this enactment) applies to English land. The issue in that case was whether the French marital régime of the community of goods, which governed the proprietary relationship of a married couple, applied to English land though not evidenced in writing as prescribed by the Statute of Frauds. Kekewich, J., held that the statute did not exclude the application of the French community régime to English lands because the community was in the nature of a partnership and came, therefore, under one of the exceptions admitted by the statute.

¹ (1796), 3 Ves. Sen. 170.

² W. W. Land, *Trusts in the Conflict of Laws*, New York, 1940.

Thus the question whether a trust in land exists in favour of a certain claimant will in every court be determined as in the courts of the *situs*. On the other hand, if by the law of the *situs* the transaction did not create a valid trust, a trust will not be held to exist either in the courts of the *situs* or even in another state where the law would have created a valid trust as a result of the transaction.¹

If, on the other hand, an equity relating to foreign land has duly been created under the *lex situs*, the courts will not hesitate to extend their jurisdiction thereto even though this may lead to an indirect adjudication on the foreign land itself. The courts have consequently enforced trusts relating to foreign land ; ² they have recognised equities relating to mortgages over foreign land ; ³ accounts of rents and profits have been ordered ; ⁴ and specific performance of a contract relating to foreign land has been granted.⁵ In all these cases, the English courts applied English law to the equitable relationship at issue.

¹ Beale in 20 *Harvard Law Review* 382 ; *In re Piercy*, [1895] 1 Ch. 83 ; *Nelson v. Bridport* (1846), 8 Beav. 547. ; *Brown v. Gregson*, [1920] A.C. 860, 876, 885.

² *Lord Kildare v. Eustace* (1686), 2 Cas. in Ch. 188 ; *Ewing v. Orr-Ewing* (1883), L.R. 9 App. Cas. 34.

³ *British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 2 Ch. 502 ; *Beckford v. Kemble* (1822), 1 Sim & St. 7 ; *Toller v. Carteret* (1705), 2 Vern. 494.

⁴ *Carteret v. Petty* (1676), 2 Swan. 323 ; *Roberdeau v. Rous* (1738), 1 Atk. 543.

⁵ *Penn v. Lord Baltimore* (1750), 1 Ves. 444.

CHAPTER VIII

THE LAW OF MOVABLES *

A system of law developed by judges in the course of the judicial process is bound to be of uneven growth. Whilst in some provinces of law litigation provides an early opportunity to the courts of explaining the principles on which the law rests, other branches of the law suffer for a long time from such dearth of authority that it is difficult to give a clear account of them. In the conflict of laws, the law relating to the acquisition and transfer of title to tangible movables (chattels, choses in possession) and that dealing with the creation and assignment of intangible movables (choses in action) are the most undeveloped parts of that body of law; the few decided cases do not reveal a coherent system, and important topics, such as the law governing the *res in transitu*, have not yet been reviewed on principle by the courts.

As regards the law of movables, the difficulties due to the absence of guiding authority are enhanced by the fact that the leading writers on the conflict of laws are by no means agreed as to the rule which should be applied. We shall see that three possible theories have been advanced, each with widely differing effect, and that these diverging views are supported by such eminent writers as Story, Dicey and Professor Cheshire.

In this state of affairs it is safest to revert to the fundamental principles involved. They have been stated by Professor Beale ¹ as follows—

It is at this point that the laws of property and of contracts are closest. Does title to movables pass, as title to an immovable passes, by the law of property or is it all a question of the operation of a contract of sale?

We are dealing here with the title to movables, with dispositions operating *in rem*, whereby property passes from the vendor to the purchaser, from the mortgagor to the mortgagee, from the donor to the donee. The distinction between the transfer of ownership in goods and the contract underlying such transfer is essential in English law. This can be inferred from the fundamental distinction drawn by Sect. 1 of the Sale of Goods Act, 1893, between the "sale" and the

* For further reading: J. H. C. Morris, "The Transfer of Chattels in the Conflict of Laws," (1945) in *B.Y.B.I.L.*, Vol. 22, p. 233; J. D. Falconbridge, "Movables and Immovables in the Conflict of Laws," in 18 *Canadian Bar Review*, 1940, p. 568.

¹ 2 Beale, 977.

"agreement to sell." Whilst the contract affects only the relationship of the parties *inter se*, the title to the goods takes effect against the whole world. Consequently, a title duly acquired under one system of law must be operative everywhere. "The principle which has been established is, I take it, this, that a good title acquired in one country shall be a good title all over the globe."¹ The absolute effect attributed to the transfer of title is, it is believed, the main reason why the preponderance of judicial authority in English law favours the view that the *lex situs* is the principle governing the transfer of title to movables.

Turning back to the question formulated by Professor Beale,² the answer is that, on principle, title to movables, like title to immovables, passes by the law of property, and that the transfer of personal property by sale, mortgage, gift or other transaction *inter vivos* approximates more nearly to a transfer of real estate than to a contract.

I. DIFFERENT THEORIES AS TO THE LAW GOVERNING THE TRANSFER OF MOVABLES

The difficulties likely to arise with respect to the title to movables may be indicated by the following hypothetical case.

A, a domiciled Scotsman, sells 1,000 boxes of Spanish oranges to B at Covent Garden, London. The oranges are at the time of the conclusion of the sale stored in a warehouse in a Spanish port. The parties agree that the property in the oranges shall pass immediately. Which legal system, the Scottish, the English or the Spanish, governs the transfer of the property in the oranges?

These facts present three points of connection with a territorial legal system. First, it could be argued that the transfer of the title in the oranges has to comply with Spanish law because this is the *lex situs* of the movables in question. Secondly, English law as the *lex actus*, i.e. the law of the place where the transaction was perfected, might apply, and thirdly, Scottish law as the *lex domicilii* of the vendor might govern the issue. All three systems have been suggested by eminent authority.

It should be observed that in our example the three competing legal systems are different. In practice, the facts of the case may be simpler. Two of the three competing laws or even all of them may coincide.³ For instance, if the oranges have already been shipped to

¹ *Per* Page Wood, V.C., in *Simpson v. Fogo* (1862), 1 Hem. & Mills, 195, 222.

² P. 181, *ante*.

³ See the dictum of Scrutton, L.J., in *Republica de Guatemala v. Nuñez*, [1927] 1 K.B. 669, 689.

London and are stored there, the *lex situs* of the goods and the *lex actus* would be identical; or, if the goods were still in Spain but the transferor were domiciled in England, the *lex actus* and the *lex domicilii* would be the same; or, if a domiciled Englishman transferred the property in oranges stored in England at Covent Garden, London, then all three relevant systems would coincide.

For our purposes, it is convenient to keep the three legal systems separate; this will facilitate our attempt to discern the general principle underlying the transfer of movables.

1. *MOBILIA SEQUUNTUR PERSONAM.*

Of the three theories which we have mentioned, the oldest is that of the *lex domicilii*. It is said in its favour that movables can easily be transferred from one locality to another, and that, in order to avoid the uncertainty arising from the local situation of the movable at the relevant time, *mobilia sequuntur personam* or *mobilia ossibus inherent*. The view that the personal law of the vendor governs the transfer of movables commended itself to the early Anglo-American lawyer for two reasons. First, it provided a definite test regarding the transfer of goods in transit, a matter of importance for seagoing nations such as the English and American. Secondly, it admitted a reasonable answer to the question as to which law governs the distribution of movables in case of the death of the owner of the goods. Both reasons have been adopted by Story¹ who is the protagonist of the *mobilia sequuntur personam* doctrine—

If the law *rei sitae* were generally to prevail in regard to movables it would be utterly impossible for the owner in many cases to know in what manner to dispose of them during his life, or to distribute them at his death; not only from the uncertainty of their situation in the transit to and from different places, but from the impracticability of knowing, with minute accuracy, the laws of transfers *inter vivos*, or of testamentary dispositions and successions in the different countries in which they might happen to be.

In some older English decisions,² the applicability of the rule "*mobilia sequuntur personam*" has been stated in very wide terms. Thus, Lord Loughborough said in *Sill v. Worswick*³—

First, it is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that

¹ Para. 379, 7th ed., 1872, p. 478.

² *Sill v. Worswick* (1791), 1 H.Bl. 665; *Bowman v. Reeve* (1721), Prec. Ch. 577; *Pipon v. Pipon* (1744), Amb. 25.

³ (1791), 1 H.Bl. 665, 690.

is, not that personal property has no visible locality but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person.

The modern view is that the principle governing the title to movables is "somewhat too broadly stated in this dictum."¹ The *mobilia sequuntur personam* doctrine certainly does not extend to the transfer of individual movables *inter vivos*. Its applicability is restricted to the transmission of movables by way of general assignment. Most English judicial authorities which express themselves in favour of the *mobilia sequuntur personam* rule deal with issues arising from general assignments.² "This indeed seems to be a more plausible view than assigning validity on the score to domicile, the connection of which with individual assignments is not at all obvious."³ In fact, when turning back to our example at page 182, it is hard to say why the fact that the seller has retained the *animus revertendi* with respect to his Scottish home should affect the sale of the oranges at Covent Garden. The application of the *mobilia sequuntur personam* doctrine to ordinary mercantile transactions would frequently necessitate a difficult investigation into the personal law of the transferor, which would appear entirely irrelevant, and import an element of uncertainty obnoxious to international trade.

2. THE *LEX ACTUS*.

A more persuasive argument is that in favour of the *lex actus*. Reverting to our example it seems *prima facie* convincing that the sale of the oranges should be governed by English law because the sale took place within the English jurisdiction. The supporters of this view, including among them the weighty authority of Professor Cheshire, can refer to formidable *dicta* from the Bench in their favour. Thus, Romer, J., said in *Alcock v. Smith*,⁴ a case concerned with the sale of a bill of exchange—

Generally, the rights of transferor and transferee on a transfer, in one country, of a document of title to a debt or to an interest in personal property are governed by the law of the country where the transfer takes place, although the debt may be due from persons

¹ *Per* Channell, J., in *Dulaney v. Merry & Son*, [1901] 1 Q.B. 536, 540.

² *Bowman v. Reeve* (1721), Prec. Ch. 577 (succession on death); *Pipon v. Pipon* (1744), Ambl. 25 (succession on death in case of intestacy); *Sill v. Worswick* (1791), 1 H. Bl. 665 (bankruptcy); in *Dulaney v. Merry & Son*, [1901] 1 Q.B. 536, a particular assignment was concerned, but the issue was the interpretation of the Deeds of Arrangement Act, 1887; Dicey, 4th ed., Rule 154, Comment, p. 586.

³ Dicey, 4th ed., Rule 154, Comment, p. 587.

⁴ [1892] 1 Ch. 238, 255.

Similar observations were made in the same case by Kay, J.,¹ and by Vaughan Williams, L.J., and further by Romer, L.J., in *Embiricos v. Anglo-Austrian Bank*.²

As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicile of the owner, but upon the law of the country in which the transfer takes place. Our own law as to distress and market overt is illustrative of this. The goods of a foreigner distrained in the house tenanted by an Englishman in this country may be sold for the tenant's rent, and the purchaser acquires a perfect title, whatever may be the law of the owner's domicile.

¹ At p. 267. ² [1905] 1 K.B. 677, 683, 685; *ante*, p. 138.

* The facts of this case have been explained earlier at p. 138.

⁶ At p. 874. ⁷ [1892] 1 Ch. 238.

^a *Ibid.*

Further, the advocates of the *lex actus* base their thesis on general considerations; reverting once again to our example on page 182, there is, no doubt, great force in their argument, as far as the relationship between the seller *A* and the purchaser *B* is concerned. Indeed, it would clearly appear unconscionable if *B* refused payment of the purchase price for the reason that some formality provided by the law of Spain had not been observed. The position is, however, immediately changed if the circumstances of the case are varied. If, e.g., *C*, a creditor of *A*, signed judgment against *A* in the competent Spanish court and levied execution on the oranges, could his title be defeated by a transfer from *A* to *B* effected prior to the attachment by *C* and not made in compliance with the Spanish form? Or, to give another example, if the oranges are shipped from Spain to England, and the ship is stranded off Portugal and the master sells the oranges to *D*, a Portuguese purchaser, in a manner valid according to Portuguese law but not conferring title on the purchaser according to the law of England, would *D*'s title be invalid and *B*'s title prevail? The answer is evidently that in both cases the title of *C* and *D* which is acquired under the *lex situs* must have priority over the title of *B* acquired according to the *lex actus*.

This position prompts the principal supporter of the *lex actus* theory, Professor Cheshire, to an interpretation of the *lex actus* which appears to strain the natural meaning of this phrase ¹—

This expression is often taken to mean the law of the country where the transfer is effected, but its correct meaning is that legal system with which the transfer has the most real connection. The *lex actus*, in other words, is equivalent to the proper law of the contract.

This view not only lacks support from the authorities, but is, in addition, hardly defensible on principle. The attempt to treat the transfer of movables in the same way as a contract does not take sufficiently into consideration the fundamental distinction between the personal obligation arising from contract and the absolute effect of the transfer of property. The personal relationship of the contracting parties can, without harm to third persons, be subjected to the law expressly or presumably intended by the parties. The transfer of property, on the other hand, directly affects third parties; their interests cannot be neglected. Even if, to follow our example, *A* and *B* when concluding the sale of oranges at Covent Garden, expressly agree that the transfer of the title to the oranges should be governed exclusively by the law of England, they could not defeat the title of

¹ 3rd ed., p. 564.

C or D which is in no way dependent on their agreement. The attempt to interpret the *lex actus* as the "proper" law of the transfer,¹ would render the conception of the proper law etheric and meaningless, whilst these attributes are not justified if the proper law doctrine is restricted to the province of contract. For these reasons the proper law doctrine cannot—as was suggested by Professor Cheshire in the second edition of his textbook²—be accepted as the guiding principle for the transfer of movables, and it is noteworthy that in the third edition of his book the Vinerian Professor has considerably qualified his former views.³

3. THE *LEX SITUS*.

The last of the three theories contending for recognition as regards the transfer of movables is that the transfer is governed by the *lex situs*. This theory was propounded by Savigny in the following passage which, it is believed, provides a juristic explanation for the *lex situs* principle as accepted in Anglo-American law. Savigny says⁴—

The main question, however, remains always this: Whether there is any valid reason for judging real rights to movable things by a different local law from immovables? This must be utterly denied.⁵

In English law, the *lex situs* theory is supported by Dicey⁶ and Westlake;⁷ in American law by Beale⁸ and Wharton.⁹ The American *Restatement*¹⁰ has also adopted this principle. Dicey¹⁰ formulates it as follows—

A transfer of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the transfer (*lex situs*), wherever such transfer is made, is valid.

To the same effect is the rule in the American *Restatement*—

Whether a conveyance of a chattel which is in due form and is made by a party who has capacity to convey it, is in other respects valid, is determined by the law of the state where the chattel is at the time of the conveyance.¹¹

¹ Cheshire, 2nd ed., p. 431; see also J. H. C. Morris, *loc. cit.*, p. 247.

² 2nd ed., p. 431.

³ *System* (transl. Guthrie), p. 134.

⁴ Dicey, 5th ed., Rule 152, p. 608, but compare Rule 154.

⁵ Westlake, 7th ed., p. 202, para. 150.

⁶ Wharton, p. 312.

⁷ 2 Beale, 981, para. 255, 5.

⁸ *Restatement*, para. 257.

⁹ Dicey, 5th ed., Rule 152, p. 608, but compare Rule 154.

¹⁰ Para. 257, with respect to capacity and formalities. The principle as such is laid down in paras. 255 and 256 of the *Restatement*.

These passages, and in particular, the statement of Dicey, represent, it is believed, the English doctrine as deducible from the few decisions available on this topic.

From the point of view of substantial justice, the application of the *lex situs* principle to the transfer of movables is satisfactory, in particular because the interests of third persons are protected. This has already been demonstrated earlier when we varied our example of the sale of the oranges¹ by introducing the Spanish creditor C and the Portuguese purchaser D.² The same example makes it evident, however, that the principle must admit of exceptions.

II. THE ENGLISH DOCTRINE

The English doctrine is stated in the opinion of the judges delivered by Blackburn, J., to the House of Lords in *Castrique v. Imrie*.³ There it is said—

In the case of *Cammel v. Sewell*⁴ a more general principle was laid down, viz. that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding elsewhere." This, we think, as a general rule, is correct, though no doubt it may be open to exceptions and qualifications.

The rule is, therefore, that the transfer of personal property is governed by the *lex situs* at the time of the transfer, but that exceptions to this rule have to be admitted. It is intended to deal first with the rule and, later, to review the exceptions thereto.

1. ON PRINCIPLE, THE *LEX SITUS* GOVERNS THE TRANSFER OF MOVABLES.

A. Statement of the principle. The principle that the transfer of movables is governed by the *lex situs* of the movable is in conformity with all English decisions⁵ and is, further, in harmony with the view adopted by the courts in cognate cases.⁶ The leading case on this subject is *Cammel v. Sewell*.⁷

¹ P. 182, *ante*.

² (1870), L.R. 4 H.L. 414, 429.

³ P. 186, *ante*.

⁴ (1860), 5 H. & N. 746.

⁵ *Cammel v. Sewell* (1858), 3 H. & N. 617; (1860), 5 H. & N. 728; *Inglis v. Usherwood* (1801), 1 East 515; *Freeman v. East India Co.* (1822), 5 B. & Ald. 617; *Liverpool Marine Co. v. Hunter* (1867), L.R. 4 Eq. 62; (1868), L.R. 3 Ch. 479; *Inglis v. Robertson* [1898] A.C. 616; *Hooper v. Gumm* (1867), L.R. 2 Ch. App. 282, 290; *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 438; further two decisions dealing with bills of exchange viz. *Acock v. Smith*, [1892] 1 Ch. 238 and *Embricos v. Anglo-Austrian Bank*, [1904] 2 K.B. 870; [1905] 1 K.B. 677.

⁶ See below, p. 190, *post*.

⁷ (1858), 3 H. & N. 617; (1860), 5 H. & N. 728.

In this case, a cargo of deals was shipped from a Russian port for English merchants residing at Hull. The vessel which sailed under the Prussian flag stranded off the coast of Norway, but the cargo was landed safely. In Norway, the master of the ship sold the cargo by public auction to an innocent purchaser for value.

By Norwegian law, the purchaser acquired an absolute title to the goods, whilst under English law the purchaser did not acquire a title because the master is the cargo-owner's agent only in case of absolute necessity. No such necessity existed here because the goods were saved and were not perishable.

The plaintiffs were underwriters who, after having paid the total loss of ship and cargo, claimed the property in the deals as salvage. They had protested against the public auction in Norway and even unsuccessfully applied to the Court to stop it.

Subsequently, the Norwegian purchaser of the deals brought the goods to England where they were delivered to the defendants. The plaintiffs claimed the goods from the defendants and, on their refusal to hand them over, sued the defendants for conversion.

The defence was that the Norwegian purchaser, who was the predecessor in title of the defendants, had acquired a good title to the goods. This was traversed by the plaintiffs.

The Court of Exchequer (Crompton, J., Cockburn, C.J., Byles, J., dissenting) gave judgment in favour of the defendants. The Court decided that the law governing the acquisition of title by the predecessor of the defendants was Norwegian law as the *lex situs* of the goods. Since the title was good under that law, it was valid everywhere. Crompton, J., said: "We think that the law on this subject was correctly stated by the Lord Chief Baron in the Court below, where he says 'If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.'"

A further illustration of the application of the *lex situs* to movables is provided by *Inglis v. Usherwood*,¹ a case dealing with the important problem of stoppage *in transitu*.

One Crane had ordered certain goods from his factor at St. Petersburg. He then chartered a ship to collect the goods from St. Petersburg and to deliver them in London. Upon her arrival in the Russian port, the goods were delivered on board ship but, before the ship sailed, the factor received information of the insolvency of Crane and caused the master of the ship to sign bills of lading in respect of the goods to his, the factor's, order. Later, Crane went bankrupt and, on the arrival of the ship in England, the plaintiff as his assignee claimed the goods from the defendant who was the master of the ship.

The plaintiff maintained that delivery on board a chartered ship at the port of loading was equivalent to delivery to the purchaser himself and that no stoppage *in transitu* could be admitted after such delivery. The argument was conclusive from the point of view of English law. The defence was that the issue was not governed by English law but by Russian law as the *lex situs* of the goods and that Russian law permitted the vendor to take repossession of his goods and stop the trans-

¹ (1801), 1 East 515.

mission of them to the purchaser in case of the latter's insolvency in spite of the goods having been delivered on board a chartered ship.

The Court gave judgment in favour of the defendant on the ground that the case was governed by Russian law. Lord Kenyon, C.J., said: "But this being a transaction in a foreign country, where a more equitable law in this respect prevails, I am far from being desirous of limiting its operation; and for the reasons before given, I think that the consignors have substantially availed themselves of it, and that the defendant by delivering the goods to their order, has done no more than he was bound to do."

B. Cognate cases. The view that, on principle, the *lex situs* of the movables governs the transfer of title to them, is supported by decisions dealing with cognate cases. In particular, the *lex situs* is invoked when the issue is whether a gift of movables is a gift *inter vivos* or *mortis causa*, and whether foreign nationalisation laws extend to movable property.

(a) WHETHER A GIFT OF MOVABLES IS A GIFT *INTER VIVOS* OR *MORTIS CAUSA*. Regarding the *donatio mortis causa*, it has been laid down in *In re Korvine's Trust*¹ that the question whether a gift of movables is to be regarded as a *donatio mortis causa* or as a testamentary disposition has to be decided according to the *lex situs* of the movable at the time of the gift. The value of this authority is not impaired by the decision of Farwell, J., in *Re Craven's Estate* No. 1.² In this case the learned Judge actually analysed the transaction on the basis of the distinction between classification and characterisation advocated here.³ Farwell, J., held that it is left to the *lex fori* (in this case the law governing the administration of the estate) to determine whether a *donatio mortis causa* is recognised and to state what its elements are. After having ascertained that under the *lex fori* a *donatio mortis causa* required delivery of the movables, Farwell, J., turned to an examination of the *lex situs* of the movable and decided that such delivery had taken place in a manner effective according to the law prevailing at the place where the movables were situate.

(b) WHETHER MOVABLES ARE SUBJECT TO FOREIGN CONFISCATION OR REQUISITION DECREES. With respect to foreign confiscation or requisition laws, it has been explained earlier⁴ that the effect of such enactments depends normally on the local situation of the movable sought to be seized. If the movable is situate within the jurisdiction of the foreign sovereign decreeing its expropriation, the English courts will recognise such decree provided the Crown has afforded *de facto* or *de jure* recognition to the government issuing it. On the other

¹ [1921] 1 Ch. 343.

⁴ See pp. 55-60, *ante*.

² [1937] 1 Ch. 431.

³ See p. 34, *ante*.

hand, if the movable is situate outside the jurisdiction of the state issuing the expropriatory legislation, the English courts will not consider the movables as attached by such legislation. In these cases, the principle of the *lex situs* is likewise applied,¹ though obviously the passing of the property by an act of State of a foreign sovereign is of different quality from the voluntary transfer of movables *inter vivos*. The general character of that principle is indicated in one of the nationalisation cases where it is said that "undoubtedly property passes according to the law of the place where it is situate."²

2. EXCEPTIONS.

We come now to the exceptions which are admitted to the *lex situs* principle as applied to the transfer of movables. There appears to be good ground for assuming that, once this branch of the law has been generally reviewed by the House of Lords, all these exceptions will be reduced to the personal relationship between the parties, as in the case of the exceptions admitted to the operation of the *lex situs* regarding immovables. As the authorities stand at present, we have to confine ourselves to the remark that these exceptions exist probably in favour of the relationship between the parties to the transfer, in the case of unconscionable conduct, and in the case of the *res in transitu*.

A. In issues between the parties to the transfer (*inter se* relationship). It seems that, in issues between the parties to a transfer of movables (and their successors and assignees), the *lex situs* does not necessarily govern. In this restricted sphere, presumably the law intended by the parties applies, whether it be the *lex actus* or the *lex domicilii*³ or another legal system. No objections can be raised thereto from the point of view of the absolute effect of the transfer, for the issue is confined to what Lord Watson⁴ has styled the "relative rights" of the parties.

The distinction between the rights of the parties to the transfer *inter se* and the position of third persons has been indicated by Lord Herschell, L.C., in *North Western Bank v. Poynter, Son & Macdonalds*⁵ in the following passage—

Of course, when I say that the rights arising out of this transaction between these parties would fall to be determined by the law

¹ Dicey, 5th ed., Rule 152, p. 609, footnotes i & k.

² *Per* Hill, J., in *The Jupiter* (No. 3), [1927] P. 122, 139.

³ Compare here Dicey, Rule 154, 5th ed., p. 620.

⁴ In *Inglis v. Robertson*, [1898] A.C. 616, 627; see also Lord Herschell, L.C., in *North Western Bank v. Poynter*, [1895] A.C. 56, 67.

⁵ [1895] A.C. 56, 67.

of England, I do not for a moment intend to dispute that, where such a transaction has been entered into, there may be proceedings or transactions in Scotland which would render a recourse to the law of Scotland necessary to ascertain the right which has arisen in respect to transactions relating to the contract though it has its basis and origin in England.

B. In case of unconscionable conduct. A further exception to the unrestricted operation of the *lex situs* regarding movables exists in the case of unconscionable conduct on the part of the person who intends to rely on the *lex situs*. This exception is, again, but the expression of the ultimate reservation in favour of the public policy of the *lex fori*. The English courts will not admit the title of a person which, though formally valid by the *lex situs*, is acquired in a fraudulent or otherwise unconscionable manner.

This exception can be inferred from *Freeman v. East India Co.*¹ though the value of this decision as an authority is impaired by the fact that the courts assumed that the foreign law in question was the same as English law. The facts of this case were similar to those in *Cammell v. Sewell*.²

In *Freeman's* case, the *Cerberus*, a British ship, on her way from Calcutta to England, was wrecked off the Cape of Good Hope. Some indigo, part of the cargo, was saved, and the master of the ship sold the indigo by public auction at the Cape. The indigo was shipped by the innocent purchaser for value to England and there deposited in the warehouse of the East India Company.

The issue was whether the master had authority to sell the indigo. If he was only entitled to do so in case of absolute necessity, then the defendants were bound to fail because no such necessity had arisen. The defendants maintained that the master's authority was wider, but they did not rely on Roman-Dutch law as conferring a valid original title on the purchaser.

The Court decided, unlike the (later) decision in *Cammell v. Sewell*, that the title acquired by the innocent purchaser under the *lex situs* of the goods was not valid. The *ratio decidendi* is revealed in the following observations of Best, J.: "The purchaser must have been aware of all this; he knew, by the advertisement of sale, that it was property that came by the ship *Cerberus* and he either did enquire or ought to have enquired under what circumstances she came to the Cape, and why her cargo was sold."

On this point, Crompton, J., in the subsequent case of *Cammell v. Sewell*,³ distinguished the facts in *Freeman's* case from those in *Cammell v. Sewell*.³ The requirements which must be satisfied, if the Court is to refuse to apply the *lex situs* for the reason that the purchaser

¹ (1822), 5 B. & Ald. 617.

² (1858), 3 H. & N. 617; (1860), 5 H. & N. 728. See p. 188, *ante*.

³ (1860), 5 H. & N. 728; 745.

acted unconscionably, were fully discussed in *Liverpool Marine Credit Company v. Hunter*.¹ Although in this case the *lex situs* ultimately prevailed, it was strenuously argued that the case came under the exception and not under the rule. The facts of the case were as follows—

A British ship was mortgaged by her owner to the plaintiffs. Both the mortgagor and the mortgagees were domiciled in England and the mortgage was duly registered at Liverpool. The ship then proceeded to New Orleans, and there English creditors of the owner, who were also domiciled within the English jurisdiction, took judicial proceedings in the courts of Louisiana, arrested her and threatened to sell her.

The mortgagees were in a dilemma. The mortgage of the ship in their favour was not recognised by the law of Louisiana, because, according to that law, the taking of possession was necessary for the acquisition of a mortgage in chattels.² The courts of Louisiana ordered, therefore, the sale of the ship. To prevent the loss of their mortgage, the mortgagees gave bonds to the owners' creditors as security, whereupon the ship was released. Later, the mortgagees asked the English courts that the defendants might be restrained from enforcing the bonds against the plaintiffs. They argued that it was inequitable of the defendants to avail themselves of the procedure in Louisiana which they knew would result in the destruction of their mortgage.

Lord Chelmsford, L.C. did not accept this argument stating that "the defendants owed no duty to the plaintiffs."³ The plaintiffs had not seized the ship unlawfully but had taken judicial steps which, according to the local practice, they were entitled to take.

C. In case of the *res in transitu*. A third exception to the strict *lex situs* rule regarding movables exists presumably in case of the transfer of goods in transit.⁴ Here, two aspects have to be distinguished. If documents of title relating to the goods are issued, e.g. bills of lading, the transfer of the goods is governed by the law governing the transfer of the documents of title. This case will be considered later in detail.⁵

If, however, the ownership in the goods is not expressed in documents of title, the problem becomes more difficult. The application of the *lex situs* is obviously out of place, for if, for instance, gold bullion is flown from Australia to England and, during transit, is sold in London, it would be clearly absurd to determine the law applicable to the transaction by the local situation of the gold at the moment

¹ (1867), L.R. 4 Eq. 62; (1868), L.R. 3 Ch. App. 479.

² The same peculiarity of the law of Louisiana was at issue in *Simpson v. Fogo* (1862), 1 Hem. & Mil. 195. There it was held that the judgment of the court of Louisiana was open to re-examination in the English courts, in consequence of its disregard of the comity of nations; see p. 195, *post*.

³ At p. 484.

⁴ F. Hellendall, "The *res in transitu* and similar problems in the Conflict of Laws," in *Canadian Bar Review*, 1939, p. 1105.

⁵ See p. 196, *post*.

when the sale was concluded. Even confirmed supporters of the *lex situs* like Savigny¹ and Beale,² agree that the *lex situs* would not be appropriate in such cases. No resort can be had to cases like *Cammel v. Sewell*³ because in that case the transit was interrupted and the goods had acquired, in Savigny's phrase, "some resting place." Whilst it is, therefore, clear that in general the *lex situs* does not apply to the *res in transitu*, it is difficult to say which law governs a transfer of goods during the period of transit. Westlake⁴ is inclined to consider the law of domicile of the owner as applicable; Professor Cheshire⁵ is in favour of the proper law of the transfer; Beale⁶ supports the view that the law of the port of destination determines the issue; whilst, according to others, the title to the goods passes according to the law prevailing at the port of shipment.

It is sometimes said that the immediate issue lies between the laws of the port of shipment and of destination. It should, however, be observed that neither system can raise a conclusive claim.⁷ If, e.g. the sale of gold bullion flown from Australia to London is negotiated at Wall Street, New York, it could well be argued that neither Australian nor English but American law applies.

The probable solution is that the transfer of goods in transit which are not the object of documents of title is governed by the law intended by the parties. The close similarity of this case to an *inter se* transaction between the parties would justify such an assumption.

If, however, the transit is interrupted and the goods have acquired a definite *situs*, other considerations prevail and the rule of *Cammel v. Sewell* applies.

III. PARTICULAR KINDS OF TITLES TO MOVABLES

In conclusion, we shall deal with some cases where particular kinds of title to movables are involved.

1. THE DERIVED TITLE.

The owner may either acquire his title by derivation from his predecessor, or he may acquire an original title defeating that of the previous owner.⁸ Whilst we have dealt with the acquisition of an original title at length in the preceding sections, a few observations

¹ Savigny, *System* (transl. Guthrie, 1869), s. 366, p. 135.

² Beale, p. 984; s. 261, 1.

⁴ 7th ed., s. 150, p. 203.

⁵ 2 Beale, p. 984; s. 261, 1.

⁶ See *per* Lord Watson in *Inglis v. Robertson*, [1898] A.C. 616, at p. 627.

⁷ Williams, *Personal Property*, 18th ed., 1926, p. 49.

³ (1860), 5 H. & N. 728.

⁸ 3rd ed., p. 594.

should be added respecting the derived title. It is obvious that a person, who bases his title on that of his predecessor, stands in all respects in the same position as his predecessor. A defect in his predecessor's title operates against him, but he can claim a priority to which his predecessor was entitled. This proposition is supported by *Cammel v. Sewell*,¹ *Freeman v. East India Co.*² and *Inglis v. Usherwood*.³

2. THE MORTGAGEE'S TITLE.

Difficulties may arise with regard to the title to a legal mortgage of a movable.

In English internal law, the grant of a legal mortgage of a movable requires the transfer of the *property* in the movable to the mortgagee, subject, of course, to the equity of redemption which remains in the mortgagor.⁴ In law, the mortgagee acquires, therefore, a title which is not different in quality from that of the outright purchaser. Not all legal systems accord such a character to a legal mortgage. From the viewpoint of many systems, and in particular those based on Roman law, the mortgagor retains the legal ownership and the right of the mortgagee is almost in the nature of a charge which is to be satisfied from the proceeds of a sale of the chattel. This difference in the doctrine forms the subject-matter of the following observations of Sir W. Page Wood, V.C., in *Simpson v. Fogo* ⁵—

The courts of Louisiana treat this mortgage title which according to English law is recognised as an absolute right in the mortgagee to sell without his consent, as amounting to nothing more than a right to be paid out of the proceeds of a sale, without saying by whom the sale is to be conducted. . . . The distinction is very important ; for this reason, that all the authorities admit that with reference to the priorities of creditors, in the administration of assets, the *lex fori* prevails . . . here what strikes me is this, that it was not a question of administering assets at all, but a question of property.⁶

In the result, the English mortgagee can, in a dispute with other creditors regarding the priority of his claim, always rely on his legal title which is not inferior to that of an absolute owner, subject, of course, to the equity of redemption which remains in the mortgagor.

¹ (1858), 3 H. & N. 617; (1850), 5 H. & N. 728.

² (1822), 5 B. & Ald. 617.

³ (1801), 1 East 515.

⁴ Goodeve's *Modern Law of Personal Property*, 8th ed., 1937, p. 164. In this respect the legal mortgage of a movable is distinguished from the pledge of the movable under which only the possession of, but not the property in, the movable passes to the pledgee.

⁵ (1862), 1 H. & N. 195, pp. 230-1.

⁶ Compare also Lord Chelmsford, L.C., in *Hooper v. Gumm* (1867), L.R. 2 Ch. App. 282, 287, 288.

3. DOCUMENTS OF TITLE TO GOODS.

According to mercantile law, certain documents representing specified goods are recognised as symbols of these goods. In these cases, the transfer of the document has the same effect as the physical delivery of the goods. The most important of these documents of title are bills of lading. With respect to them, Bowen, L.J., observed in *Sanders v. Maclean*¹—

A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo.

Goods being the subject matter of a document of title can, consequently, be transferred according to the law governing the assignment of these documents, and not by the *lex situs* of the goods which often is hardly determinable.² What, then, is the law governing the transfer of documents of title? It should be observed that these documents are of a dual character. The right evidenced by them is in the nature of a chose in action, but it has materialised in a tangible form,³ viz., the paper in which it is embodied, and the documents are, therefore, chattels, wrongful conversion of which is a tort and theft of which is a crime. For this reason, the *lex situs* of the document of title, which of necessity coincides with the *lex actus* of the transfer,⁴ governs both the transfer of the bill⁵ and normally the transfer of the goods symbolised thereby. If, e.g. goods are shipped from Australia to Norway, and the Australian consignor sends the bills of lading to his correspondent in London who indorses them to a Norwegian bank, this transaction is governed in its entirety by English law; the transfer of the goods represented by the bills is, in this case, also determined by English law.

A conflict may, however, arise between the law of the actual situation of the goods and that governing the document of the title. A may base his claim to the goods directly on the *lex situs* of the goods, and B may claim the goods as the indorsee of a valid document of title. Which law prevails in a conflict between the actual *lex situs* of the goods, and the *lex actus* of the transfer of the document of title? This question arose in *Inglis v. Robertson and Baxter*.⁶

¹ (1883), 11 Q.B.D. 327, at p. 341 (C.A.).

² On the transfer of goods in transit which are not represented by documents of title, see p. 193, *ante*.

³ As in the case of bills of exchange and cheques; *Alcock v. Smith*; *Embricos v. Anglo-Austrian Bank*; p. 138, *ante*.

⁵ See Dicey, 5th ed., p. 995, No. 4.

⁴ See p. 185, *ante*.
⁶ [1898] A.C. 616.

In this case, Goldsmith, a wine merchant in London, was the owner of a number of hogsheads of Scotch whisky stored in a warehouse at Glasgow. Goldsmith had received delivery warrants (which were in the nature of documents of title to the whisky) from the warehouse keeper; Goldsmith then assigned the whisky to the defendant Inglis who had lent him money, by indorsing and delivering the delivery warrants to him. The defendant omitted to notify the assignment to the warehousekeeper.

Subsequently, the plaintiffs Robertson and Baxter, Glasgow merchants, who were personal creditors of Goldsmith arrested the whisky in the hands of the warehousekeeper in a manner valid by Scottish law.

According to Scottish law, the indorsement of the delivery warrants did not confer upon the indorsee a right *in rem* in the whisky. According to English law, the position was apparently different.

The issue was whether the title of the defendant as indorsee of the delivery warrants prevailed over that of the plaintiffs as personal creditors who had arrested the goods. The defendant based his claim on English law as the *lex actus* of the indorsement; the latter relied on Scottish law as the *lex situs* of the goods.

The House of Lords decided in favour of the plaintiffs and held that Scottish law applied and that, therefore, the title of the personal creditors prevailed. Lord Watson said: "The crucial question in this case is whether the right goes further, and vests in the pledgee of the documents, not a *jus ad rem* merely, but a real interest in the goods to which these documents relate. That is a question which I have no hesitation in holding must, in the circumstances of this case, be solved by reference to the law of Scotland. The whisky was in Scotland, and was there held in actual possession by a custodier for Goldsmith as the true owner. That state of the title could not, so far as Scotland was concerned, be altered or overcome by a foreign transaction of pledge which had not, according to the rules of Scottish law, the effect of vesting the property of the whisky, or, in other words, as *jus in re*, in the pledgee."

The result is, therefore, that if the law of the symbol, i.e. the document of title, conflicts with the actual *lex situs* of the goods represented by the document, the *lex situs* of the goods must prevail.

CHAPTER IX

THE LAW OF CHOSSES IN ACTION (INTANGIBLE MOVABLES)

In a monograph which has done much to elucidate the obscure and still rudimentary theoretical basis of the conflict of laws governing choses in action, Dean Falconbridge observes that "the question of the transfer *inter vivos* of the debt or chose in action is in a state of doubt or confusion in the English conflict of laws."¹ To what extent this criticism is justified may be seen from Mr. Foster's remark regarding a decision which is generally considered as one of the leading authorities on the subject. Mr. Foster observes—²

In the single case of *Republica de Guatemala v. Nuñez*³ four judges advanced no less than five different theories on the validity of and the capacity to make an assignment of a debt, in which they agreed and disagreed with each other in a number of permutations and combinations which would have done credit to the indefatigable selectors of cricket teams in a school arithmetic.⁴

Such, then, is the state of the law on this subject. If, however, we analyse the law carefully, the task of establishing the principles which apply is not, it is believed, hopeless.

I. GENERAL PRINCIPLES

1. WHAT IS A CHOSE IN ACTION?

The first question is: what is a chose in action in the sense in which this expression is employed in this chapter?

Choses in action can, in general, be divided into four classes.⁵ The first class consists of negotiable instruments or quasi-negotiable instruments; here the debt is embodied in a tangible movable, and the assignment of the debt would be imperfect without the delivery of the instrument; under this class fall bills of exchange and cheques⁶ as well as documents of title like bills of lading.⁷ There is general consent

¹ John D. Falconbridge, "Situs and Transfer of Intangibles in the Conflict of Laws," in 13 *Canadian Bar Review*, 1935, pp. 265, 273.

² J. G. Foster, "Some Defects in the English Rules of Conflict of Laws" in 16 *B.Y.B.I.L.*, 1935, p. 84.

³ (1926), 42 T.L.R. 625; [1927] 1 K.B. 669; see p. 210, *post*.

⁴ At p. 94.

⁵ The following observations are based on Dean Falconbridge's research, *loc. cit.*, p. 269.

⁶ See p. 132, *ante*.

⁷ See p. 196, *ante*.

that these debts are treated, in some respects, as tangible movables; they have materialised in a corporeal form and take their character from this form. They are governed by considerations which have been discussed above and they are outside the scope of this chapter.

The second class of choses in action extends to formal deeds which are usually called specialties. Here, too, the debt is connected with a corporeal movable. But the connection is not so close as in the first case, and an assignment of the debt is valid without delivery of the instrument though naturally it may be difficult,¹ in the absence of the original deed, to prove its due execution. So far as the assignment of the debt is concerned, the connection between the debt and the document is not a matter of necessity, and it would not be justifiable to apply the rules governing the transfer of tangible movables to this class of debts. Specialties are, therefore, included in the term choses in action as employed in this chapter, subject to a two-fold qualification. Debts embodied in negotiable instruments are sometimes executed under seal; in this case they are considered as movables and are outside the scope of this chapter. Further, certain deeds, such as mortgages or leases, refer to real estate; they are then subject to the conflictual rules relating to immovables and equally outside the present enquiry. An ordinary money bond, on the other hand, is an illustration of a specialty debt being a chose in action in the conflictual sense.

The third class of choses in action are simple contract debts, which are neither embodied in negotiable instruments nor in specialties. They are choses in action in the proper sense of the phrase; their assignment is governed by the rules discussed in this chapter.

The fourth class of choses in action comprises such personal property of an incorporeal nature² as is not, like a debt, simply the right of a creditor to recover a sum of money from the debtor. Under this class fall peculiar types of property such as shares in companies, patents, copyright, trade marks, the goodwill of a business and so on. It will be observed that, almost invariably, these incorporeal rights are connected with a locality, e.g. shares and patents with the place where the respective registers are kept, the goodwill with the place where the business premises are situate, etc. The ensuing exposition of the law of choses in action includes this class too.

¹ But not impossible, see *Sugden v. Lord St. Leonards* (1876) 1, P.D. 154 (in this case the lost document was not a deed, but a will).

² Cf. Goodeve, *op. cit.*, 8th ed., 1937, p. 213.

In the result, therefore, the following types of intangible property are covered by our definition of chose in action—

1. specialty debts ;
2. simple contract debts ;
3. other personal property of an incorporeal nature (shares, patents, etc.).

2. THE DIFFERENT PROBLEMS.

We now come to an examination of the conflictual problems which are likely to arise in connection with the assignment of a chose in action. It is intended to exemplify these possibilities by the following hypothetical facts—

A, domiciled in the United States, has a banking account with *B*, in London. Whilst touring in France *A* assigns this banking account to *C*.

Here the following problems are likely to arise : *A*, the assignor, may have a dispute with *C*, his assignee ; such dispute need not necessarily concern the debtor *B* ; if both the assignor and the assignee claim the debt from him, he would leave it to them to fight out the issue *inter se* and disinterest himself by way of interpleader proceedings.

Further, a dispute may arise between the assignee *C* and the debtor *B*. *C* may, for instance, claim that the assignment confers on him certain rights which a French assignment usually entails but which are not implied in an English assignment. A dispute between the assignee and the debtor contains an apparent rather than an actual difficulty, for it is obvious that the obligations of the debtor cannot be altered and, in particular, cannot be increased by his creditor electing to assign the debt. For this reason the debtor's duties in relation to his creditor's assignees are always governed by the proper law of the original contract which gave rise to the assigned debt.

The example, mentioned above, may, however, be varied.

After the assignment, while in France, of his claim against *B* to *C*, *A* may cross into Italy and there assign the claim for the second time to *D*.

A third problem is then likely to arise, namely a dispute between *C*, the first assignee, and *D*, the second assignee. Each of the two assignees will claim that his title is better than that of his rival ; they will, as it is sometimes expressed, contend for priority. Here a problem of great perplexity arises, because it is possible that both assignees may refer to assignments which are perfectly valid according to the

respective *leges actus*; the assignment from *A* to *C* may satisfy French law though it is perhaps invalid according to any other of the competing legal systems, whilst at the same time the assignment from *A* to *D* may comply with the requirements of Italian law but be bad by French law.

It is important to distinguish between the different problems which might arise in connection with the assignment of a chose in action. Thus, Bankes, L.J., said in *Republica de Guatemala v. Nuñez*¹—

Where the appellant's argument fails, in my opinion, is in not appreciating the distinction which, I think, exists between cases where the dispute is not in reference to the original contract at all but is one of priorities.

However, though these differentiations may require special considerations and admit of exceptions to the general principle, it should not be inferred that the search for a general principle in this province of the law is necessarily a vain one.

3. THE DIFFERENT THEORIES.

Returning now to our illustrations on page 200, it will be seen that the choice between the legal systems applicable to the assignment of a chose in action lies between four systems, viz.—

- (1) the personal law of the assignor, i.e. the law of domicile of *A*; or
- (2) the law of the place where the assignment was perfected, i.e. French law in the case of *C* and Italian law in the case of *D*; or
- (3) the proper law of the original contract, i.e. of the contract between *A* and *B*; or
- (4) it is possible to allocate an artificial seat to the chose in action, and to hold that the law prevailing at the place of the artificial seat shall govern the assignment.²

We shall now examine these four theories in detail.

A. The *mobilia sequuntur personam* theory. Older jurists, like Story³ and Phillimore⁴ considered the *lex domicilii* of the assignor as the law determining the validity of the assignment of a chose in action. To them this rule was but an application of a much wider principle, namely that *mobilia sequuntur personam*. Indeed, with respect to choses in action which are abstract creations of the law, it would not seem unnatural to assume that they have "no locality."*

* For further reading: Dicey, 5th ed., p. 991, note 29, "The situs of choses in action and ships."

¹ [1927] 1 K.B. 669, 684.

² The examination of these theories is, again, based on the research of Dean Falconbridge in 13 *Canadian Bar Review*, 1935, p. 265.

³ Story, s. 362.

⁴ Phillimore, IV, 544.

It has, however, already been observed, when discussing the *mobilia sequuntur personam* rule in its application to tangible movables, that in the modern conflict of laws this doctrine is no longer considered as governing the transfer or assignment of personal property *inter vivos*.¹ The reasons stated there apply with equal force to the assignment of choses in action.

Further, it should not be overlooked that the view that choses in action have "no locality" is supported by judicial authority.² On the other hand, Luxmoore, J., observed—

For it is settled by the decision of the Court of Appeal in *Republica de Guatemala v. Nuñez* that an alleged assignment which is invalid according to the *lex domicilii* cannot, if the domicil is other than English, be enforced in the English courts.³

In view of the diversity of problems which may result from the assignment of a chose in action, it is obvious that in exceptional circumstances the courts might attach importance to the fact that the parties concerned have a common domicil.⁴ This does not detract from the value of our statement that, in general, the assignment of a chose in action is not governed by the maxim *mobilia sequuntur personam*.

B. The *lex actus* theory. It has, further, been suggested that the principle governing the validity of the transfer of a chose in action is the *lex actus* of the assignment. This means that if the assignment complies with the law of the place where it is effected, it is valid everywhere. This rule is recognised as the leading principle in the *American Restatement*. There it is stated that—

the effect of an assignment of a contract right as between the assignor and the assignee is determined by the law of the place of assignment.

It is, however, noteworthy that this statement contains an important qualification: its application is limited to the effect "as between the assignor and the assignee." It cannot be disputed that, in the relationship between the assignor and the assignee, the *lex actus* often appears as appropriate for the determination of the issue. Thus it is reasonable to assume that, in our examples on page 200, the courts, in a dispute between A and C, would attach importance to French

¹ See p. 184, *ante*.

² See Day, J., in *Lee v. Abdy* (1886), 17 Q.B.D. 309, 312. Lord Esher and Lopes, L.J.J., in *Smelting Co. of Australia Ltd. v. Commissioners of Inland Revenue*, [1897] 1 Q.B. 175; Lord Halsbury, L.C., in the *Commissioners of Inland Revenue v. Muller & Co.'s Margarine Ltd.*, [1901] A.C. 217, 238.

³ *Finska Angfartygs A/B & others v. Baring Brothers & Co. Ltd.* (1937), 54 T.L.R., 147.

⁴ See p. 211, *post*.

law as the law of the place where the transaction was perfected; in the same way a dispute between *A* and *D* on the validity of the second assignment would probably be tested by Italian law. This view is, as will be seen later, supported by judicial authority, at least in so far as the *lex actus* of the assignment and the *lex domicilii* of the assignor are identical.¹

Despite the fact that in special circumstances the *lex actus* might determine the issue, this law cannot be regarded as the general principle governing the assignment of a chose in action. Two reasons militate strongly against such an assumption, one practical and the other doctrinal. First, the test of the *lex actus* is valueless if the assignor has assigned the debt several times and a dispute arises between the several assignees who contend for priority; here several *leges actus* exist and the several assignments may be perfectly valid according to their respective *leges actus*. For instance; in our illustration, *C* and *D* may claim the money from the debtor *B*, and both may refer to assignments perfectly valid according to French and Italian law. "In a case like this it is obvious that resort must be had to some one law to decide the question of priorities."² For this reason the American *Restatement* modifies its general adherence to the *lex actus* by the following provisions³—

The law of the place of performance of an assigned contract determines whether payment by the obligor to a second assignee destroys the right to performance for the first assignee.

The fact that the *lex actus* theory does not provide a solution of the important question of priorities is a major obstacle to its recognition as the general principle determining the assignment of the chose in action.

The second, theoretical, objection to this view has been indicated by Professor Keith as follows⁴—

There is, however, a difficulty even in the American doctrine on this topic. It treats an assignment of a contractual right as essentially different from that of a chattel or tangible movable, and assimilates the law affecting it to the law affecting contracting. It ignores thus the alternative view⁵ that a debt can be assimilated to a chattel, and made subject to the same treatment, so that the law of the

¹ Greer, J., in *Republica de Guatemala v. Nuñez* (1926), 42 T.L.R. 625; Scrutton, L.J., *ibid.*, [1927] 1 K.B. 669, 698; Maugham, J., in *In re Ansoni*, [1930] 1 Ch. 407, 421, 422.

² Falconbridge, *loc. cit.*, 275.

³ Para. 354.

⁴ Keith, "The American Law Institute Restatement of the Conflict of Laws," in *University of Toronto Law Journal*, 1936, pp. 233, 253.

⁵ Dicey, pp. 620 and 999-1003.

country where the debt is situate should govern all issues affecting its assignment.

Professor Keith expresses the view that the American doctrine in favour of the *lex actus* should be accepted by English law which he considers as still unsettled. The preponderance of the English authorities on the question of assignment of the title is, however, clearly in favour of a treatment of the chose in action analogous to that accorded to the tangible chattel.

C. The theory in favour of the law of the original contract. The third theory which has been advanced in this respect is in favour of the proper law of the original contract. It is advocated by Professor Cheshire who follows a dictum of Mr. Foote.¹ Professor Cheshire says ²—

It is submitted that there is an obvious answer to the question—what is the most appropriate law to govern questions arising from the voluntary assignment of a chose in action? The clue is furnished by Foote, when he says that “the assignment of a chose in action arising out of a contract is governed by the proper law of the contract.”³ If we understand him correctly, the appropriate law is not the “proper law” (using that expression in its contractual sense) of the assignment, but the proper law of the original transaction out of which the chose in action arose.

Professor Cheshire's main argument is that the incident of assignment should not be treated differently from the other incidents of the contract which are all governed by the proper law of the contract. Professor Cheshire's answer to the antithesis formulated by Professor Keith is that the assignment of a chose in action should be treated in the same way as the original contract and not be regarded as the transfer of a chattel. Whether this is theoretically sound is a matter for argument. The principal objection to Professor Cheshire's view is that it is hardly reconcilable with the authorities as they stand at present. Professor Cheshire refers to the decision of Warrington, J., in *Kelly v. Selwyn*⁴ in support of his view, but this case can also be explained on the basis of the theory allocating an artificial seat to the chose in action, an explanation which appears preferable because it brings the case into line with the other decisions on this topic.

D. The *lex situs* theory. Finally, a parallel has been drawn with the position of the tangible movable. In the case of the latter, the local situation of the chattel provides a natural link of connection, and this is the theoretical basis for the English rule that the transfer

¹ At p. 296.

² At p. 296.

³ 3rd ed., p. 599.

⁴ [1905] 2 Ch. 117.

of the tangible movable is governed by the *lex situs* of the movable. A local situation in the natural sense of the phrase is conspicuously absent in the case of an abstraction of law such as the chose in action. It has, however, been said that, by way of legal fiction, a locality must be ascribed to a chose in action, and that, in consequence, a debt or other chose in action has in law a *situs* similar to that of a chattel. At first sight this thesis seems to be a startling and highly artificial proposition. However, for a number of purposes, e.g. for those of taxation, it is necessary to allocate a locality to a chose in action in order to determine whether it falls within the territorial sovereignty of one state or another. Moreover, this fiction renders it possible to treat all kinds of real and personal property on the basis of the same principle, viz. the *lex situs*, a result highly desirable from the point of view of doctrine. The *lex situs* theory provides also a satisfactory solution to the problem of priorities because it assigns the decision to a single system of law.

The view that, in principle, the assignment of a chose in action is determined by the *lex situs* of the chose in action, is sponsored by Dicey,¹ Westlake² and Falconbridge.³ Dicey states the principle as follows—

An assignment of a movable which cannot be touched, i.e. of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt) (and made therein) is valid.

Dean Falconbridge³ recommends the principle for its substantial advantages and considers its application as “attractively simple.” It will be seen later, however, that great as the advantages of this doctrine are in comparison with the others, its application raises a general problem of some complexity, namely the exact definition of the fictitious *situs* of a chose in action.

II. THE ENGLISH DOCTRINE

1. THE ENGLISH RULES STATED.

The rules of the conflict of laws on the assignment of a chose in action can be stated as follows—

- (1) On principle the validity and effect of the assignment of a chose in action has to be determined by the law prevailing at the place where the chose in action is located (*lex situs* of the debt).

¹ Dicey, 5th ed., Rule 153.

² Westlake, 7th ed., s. 152, p. 207.

³ Falconbridge, *op. cit.*, 274.

(2) Exceptions—

A. As between the assignor and the assignee, the validity and effect of the assignment has to be ascertained by the law which the parties intended to apply, presumably the *lex actus* of the assignment.

B. As between the assignee and the original debtor, the proper law of the original contract, from which the chose in action arose, governs the validity and effect of the assignment.

2. IN PRINCIPLE, THE ASSIGNMENT IS GOVERNED BY THE *LEX SITUS* OF THE CHOSE IN ACTION.

The principle that the *lex situs* determines the validity of the assignment has been expressed by Bankes, L.J., in *Republica de Guatemala v. Nuñez*¹ in the following passage—

I am quite prepared to assent to the argument of the appellant's counsel that the weight of authority is that a chose in action has a locality, or quasilocality, which may determine the law applicable to the contract.²

Further, in *New York Life Insurance Co. v. Public Trustee*,³ Atkin, L.J., observed⁴—

The question as to the locality, the situation of a debt or a chose in action is obviously difficult, because it involves considerations of what must be considered to be legal fictions. A debt, or a chose in action, as a matter of fact, is not a matter of which you can predicate position; nevertheless, for a great many purposes it has to be ascertained where a debt or chose in action is situated, and certain rules have been laid down in this country which have been derived from the practice of the ecclesiastical authorities.

The view that the *lex situs* of the debt determines—subject to exceptions—the assignment of a chose in action is further supported by decisions in cognate cases allocating a “*situs*” to a chose in action for purposes other than that of assignment. Thus, “the whole mass of probate and administration, no less than taxation cases, rests on the possibility of ascribing local situation to anything.”⁵ A local seat was, further, attributed to choses in action by the Treaty of Peace Order, 1919, which provided for a charge on all that “property rights and interests” within His Majesty's Dominions belonging to German

¹ [1927] 1 K.B. 669, 683.

² After having referred to numerous authorities in support of this opinion, the learned judge proceeded to explain that this principle did not apply to the particular case under review; see p. 210, *post*.

³ [1924] 2 Ch. 101, 109.

⁴ At p. 119.

⁵ Dicey, 5th ed., p. 992.

nationals at a certain date.¹ The allocation of a seat is also attributed to choses in action for purposes of taxation; in one of the tax cases, the Judicial Committee remarked²—

It has been long established in the courts of this country . . . that a debt does possess an attribute of locality.

In one of the cases³ arising from the Peace legislation following the First World War, Scrutton, L.J., observed—

What is the *situs* of that chose in action? There is very considerable authority for saying that the *situs* of such a chose in action is where it can be recovered.

Though these decisions are clearly based on the assumption that a chose in action has a locality, the support lent by them to our principle is merely corroborative. In reality the analogy between the assignment of a chose in action and the interpretation of the statutes mentioned is slender. No inconsistency, therefore, arises from the fact that Scrutton, L.J., who, in *Sutherland v. Administrator of German Property*,⁴ had no hesitation in ascribing a locality to a chose in action, did not accept the *lex situs* doctrine in *Republica de Guatemala v. Nuñez*,⁵ a case dealing with the assignment of a debt.

We have now to ascertain which place is to be considered as the *situs* of the debt. The determination of the *situs* is relatively simple in the case of specialty debts and rights forming the fourth class of choses in action as defined above.⁶ With respect to specialties, Atkin, L.J., observed in *New York Life Insurance Co. v. Public Trustee*⁷—

The test has always been not the place and residence of the debtor, but the actual place where the actual document constituting the specialty exists—namely, where the piece of paper is to be found.

Regarding rights of the fourth class, the connection of a particular right with a locality is usually fairly obvious. Thus, the *situs* of the goodwill of a business is the place where the business is situate,⁸

¹ Treaty of Peace Order, 1919, Art. 1 (XVI); see *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101; *Sutherland v. Administrator of German Property* (1933), 50 T.L.R. 107.

² *Commissioner of Stamps v. Hope*, [1891] A.C. 476, 481.

³ *Sutherland v. Administrator of German Property* (1933), 50 T.L.R. 107, 108.

⁴ (1933), 50 T.L.R. 107.

⁵ [1927] 1 K.B. 669.

⁶ P. 199, *ante*.

⁷ [1924] 2 Ch. 101, 121; see also *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679.

⁸ Lord Macnaghten in *Muller & Co.'s Margarine Ltd. v. Commissioners of Inland Revenue*, [1901] A.C. 217, 224.

that of shares is the place where the register of transfers is kept ;¹ and that of a judgment debt the place where the judgment was recorded.²

Proceeding now to the allocation of a *situs* to the other classes of choses in action, a debt is generally situate where the debtor is resident, for this is the place where the debt can be properly recovered. This rule is supported by Dicey³ and Dean Falconbridge.⁴ It has found a lucid explanation in the judgment of Atkin, L.J., in *New York Life Insurance Co. v. Public Trustee*.⁵ After having explained that a chose in action is capable of having a locality⁶ and after having referred to the jurisdiction of the ecclesiastical authorities as the historical origin of the rule, the learned Judge continued⁷—

The result is that in the case of an ordinary individual by that rule for a long time the situation of a simple contract debt under ordinary circumstances has been held to be where the debtor resides ; that being the place where under ordinary circumstances the debt is enforceable, because it is only by bringing suit against the debtor that the amount can be recovered.

The principle that the assignment of a chose in action is ordinarily governed by the law of the place where the debt is recoverable provides a solution for the problem of priorities.⁸ This may be illustrated by *Re Queensland Mercantile and Agency Co.*⁹

The Queensland company, which was registered in Queensland (Australia), had granted to an English Bank a charge extending to its unpaid capital.

Subsequently, the company made a call on the shareholders who had never received notice of the charge in favour of the English bank. Before the calls were paid, a Scottish investment company, which had a claim against the Queensland company, commenced an action against the latter in the Scottish courts and arrested the numerous unpaid calls due from shareholders resident in Scotland. By Scottish law, this procedure was equivalent to an assignment with notice to the Scottish shareholders.

In the winding up of the Queensland company which took place in England with respect to the English assets, a dispute arose between the English bank and the Scottish investment company as to the priority in the unpaid calls due from the Scottish shareholders.

¹ *Brassard v. Smith*, [1925] A.C. 371 ; *Erie Beach Co. Ltd. v. A.G. for Ontario*, [1930] A.C. 161 ; *Williams v. Colonial Bank* (1888), 38 Ch. D. 388 ; *Colonial Bank v. Cady & Williams* (1890), 15 App. Cas. 267 ; *In re Middleton's Settlement*, [1947] Ch. 583 ; *Treasurer of Ontario v. Blonde and Treasurer of Ontario v. Aberdeen*, [1947] A.C. 24 (where shares could be effectively transferred at two places situate in different legal units).

² *Per* Lord Abinger in *A.G. v. Bouwens* (1838), 4 M. & W. 171, 191.

³ Dicey, 5th ed., pp. 992-3.

⁴ Falconbridge 270-1.

⁵ [1924] 2 Ch. 101, 119.

⁶ See p. 206, *ante*.

⁷ At p. 119.

⁸ Other cases decided on the basis of this principle are : *Kelly v. Selwyn*, [1905] 2 Ch. 117 ; *Swiss Bank Corporation v. Boehmische Industriale Bank*, [1923] 1 K.B. 673, 678 (*per* Bankes, L.J.).

⁹ [1891] 1 Ch. 536; *aff.* [1892] 1 Ch. 219.

North, J., in a judgment which was affirmed by the Court of Appeal¹ (Lindley, Bowen, Fry L.J.J.), decided the dispute on the basis of Scottish law as the law of the *situs* of the calls owed by the Scottish shareholders. By this law, the title of the Scottish company prevailed because the assignment to this company was considered as affected with notice, and therefore, had precedence over such a charge without notice to the debtor as was granted to the English bank.

Sometimes, however, it is a more complicated task to "localise" a debt. The difficulties arise, in particular, in three cases. First, to follow again Lord Atkin's comprehensive review, "it is possible in some cases to bring suits against the debtor in a territory where he is not residing by reason of the processes by which we have given our Courts jurisdiction . . . by serving the debtor resident out of the jurisdiction with notice of the proceedings."² The learned Judge refers here to the "assumed jurisdiction" under Order 11. Secondly, the debtor may be a corporation carrying on business at several places; here the debtor is resident at several places at the same time. Thirdly, a debt may at the option of the creditor be expressly made recoverable at several places. In all these instances regard must be had to the original contract between the assignor and the debtor, for this contract will indicate which place has to be considered as the principal place³ for the collection of the debt. The chose in action is then deemed to be situate at such principal place of recovery. Thus, it has been held that, if a company carries on business in several countries, the debt is situate in the country, where, according to the original contract, it was primarily payable;⁴ it was further decided that for purposes of death duty a money claim against a bank with branch offices in different parts of the Empire is located at the branch where the money was deposited.⁵ It can equally be assumed that the original and not the assumed jurisdiction determines the *situs* of the debt if these jurisdictions are competing, and that, in cases where optional places for collection of the debt were stipulated, the place which the creditor has actually elected is the *locus situs* of the debt.

It is noteworthy that this interpretation of the *lex situs* doctrine, coincides in some respect with the original contract doctrine advocated by Professor Cheshire, namely in those instances in which the proper law of the original contract is the *lex solutionis*. The two theories are,

¹ [1892] 1 Ch. 219.

² [1924] 2 Ch. at p. 120.

³ See *per* Atkin, L.J., *ibid.*, at p. 121.

⁴ See *per* Pollock, M.R., Warrington, L.J., Atkin, L.J., in *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101, 109, 115, 121.

⁵ *R. v. Lovitt*, [1912] A.C. 212; but the position is different in the case of the bank having lent money to a customer, *Maude v. Inland Revenue Commissioners* (1940), 1 All E.R. 464.

however, irreconcilably at variance in those cases where the proper law of the contract has to be ascertained on a basis other than that of the *lex solutionis*.

3. EXCEPTIONS.

We come now to an examination of the exceptions to the principle that the validity and effect of the assignment is tested by the *lex situs* of the chose in action. Such exceptions exist, it will be remembered, in two cases, viz.—

- (A) as between assignor and assignee; and
- (B) as between the original debtor and the assignee.

A. As between assignor and assignee (*inter se* relationship).

The relationship between assignor and assignee is not necessarily governed by the *lex situs*. The reasons upholding the *lex situs* in general cases do not apply to the personal relationship between the parties to an assignment *inter se*. Here the interests of third persons are not involved; and a dispute on priorities of title cannot arise. It has been seen that, in case of the transfer of both immovables and movables, the strict *lex situs* principle admits an exception in favour of personal disputes between the parties to the transfer. A similar exception arises in the case of choses in action. The authorities¹ concur in the negative aspect that the personal *nexus* between the assignor and the assignee (or persons claiming through him) is not governed by the *lex situs* as a matter of necessity; they disagree, however, on the affirmative aspect as to which law governs their personal relation. This may be illustrated by *Republica de Guatemala v. Nuñez*.²

Cabrera, the President of Guatemala, had deposited a sum of money with bankers in London. He then assigned the claim to his illegitimate son Nuñez, who was a minor at the time of the assignment; the assignment was made by way of gift and in writing, and written notice of the assignment was given to the London bankers. Both Cabrera and Nuñez were domiciled in Guatemala at the time of the assignment and the assignment was perfected there.

Subsequently, Cabrera was deposed and imprisoned. The Republic of Guatemala alleged that the deposited money formed part of a public fund which Cabrera had misappropriated and that after his imprisonment he had assigned the claim to the republic.

Both Nuñez and the republic claimed the money from the London bankers. The bankers refused to pay and took out an interpleader sum-

¹ *Republica de Guatemala v. Nuñez* (1926), 42 T.L.R. 625; [1927] 1 K.B. 669; *Finska Angfartygs A/B v. Baring Brothers*, [1937] 54 T.L.R. 147; *Re Maudslay*, [1900] 1 Ch. 602; *Re Anziani*, [1930] 1 Ch. 407; *Colonial Bank v. Cady* (1888), 38 Ch. D. 1, 388; (1890), 15 App. Cas. 267.

² (1926), 42 T.L.R. 625; aff. [1927] 1 K.B. 669.

mons. Thereupon an issue was directed to be tried between the republic and Nuñez.

This issue was not concerned with a question of priorities but with the validity of the assignments. It was perfectly clear that if both assignments were valid, the one prior in time had to prevail. The issue was first, whether the assignment from Cabrera to Nuñez was valid and, secondly, whether the subsequent assignment from Cabrera to the republic was good in law. Both issues involved the personal relationship between assignor and assignee; both issues were separate and, in principle, unconnected. This can be seen from the fact that the Court dismissed the claims of both claimants.

Regarding the alleged assignment from Cabrera to the republic, Greer, J., held, on the evidence, that no acts amounting to a valid assignment had taken place.

The question whether Cabrera had validly assigned the claim against the London bankers to his son Nuñez involved difficult questions of law. According to English law (which was the law prevailing at the *situs* of the debt) the assignment was valid. According to Guatemalan law (which was the *lex actus* of the assignment and the law prevailing at the common domicile of the parties to the assignment), the assignment was invalid for two reasons, first because Nuñez as an infant was incapable of accepting the assignment; and, secondly, because certain essential formalities—declaration of the gift before a notary on stamped paper—were not complied with.

Greer, J., and the Court of Appeal (Bankes, Scrutton, and Lawrence, L.J.J.) concurred that the issue was to be determined by the law of Guatemala, i.e. not by the *lex situs* of the debt.

The Judges did not, however, agree on the reasons why Guatemalan law governed the issue.¹

Bankes, L.J., attached importance to the fact that both parties to the assignment had their common domicile² in Guatemala.

Scrutton, L.J., based his judgment on two grounds: First, that the capacity of the assignee to accept an assignment is governed either by the *lex domicilii* of the assignee or the *lex actus* of the assignment, and that both laws were those of Guatemala; and secondly, that the assignment had to satisfy the form prescribed by the *lex actus* of the assignment.³ The second of these reasons had already been propounded by Greer, J.⁴

Lawrence, L.J.,⁵ held that the non-compliance with the Guatemalan formalities was no objection to the validity of the assignment, because the parties to the assignment had intended to submit the assignment to English law as the *lex situs* of the debt, but that the incapacity of the assignee according to the *lex actus* rendered the assignment invalid.

The negative statement, that the *lex situs* does not necessarily apply to the relationship between assignor and assignee, leaves us with the problem as to which law governs this relationship. In the present state of the authorities, no definite answer can be given to

¹ [1927] 1 K.B. 669, 686.

² This ground was followed by Luxmoore, J., in *Finsha Angfartygs A/B v. Baring Brothers* (1937), 54 T.L.R. 147, 148; aff. by C.A. (1938), 61 Ll. L.R. 257, 263; aff. by H.L., [1940] 1 All E.R. 20, 23.

³ [1927] 1 K.B. 686 *et seq.*

⁴ (1926), 42 T.L.R. 625, 629.

⁵ [1927] 1 K.B. 697 *et seq.*

this question. From the point of view of doctrine, no reason exists why the determination of the law governing the effect of the assignment as between assignor and assignee should not be left to the intention of the parties, or more correctly to that law with which the assignment, according to the intention of the parties, is most closely connected. This rule, it is submitted, lies at the bottom of the diverging view of the judges in the *Nuñez* case; from this point of view they disagreed more on the relative weight of the surrounding circumstances than on the principle of law.

B. As between assignee and original debtor. The second exception from the strict *lex situs* rule exists with respect to the relationship between the original debtor and the assignee. It is obvious that the position of the original debtor cannot be altered by the fact that the creditor has assigned his claim. The relation between these two parties cannot be governed by any law other than the proper law of the original contract. In theory this exception should be clearly recognised; in practice, however, it is sometimes ignored. This happens in those frequent cases in which the *lex situs* of the debt and the proper law of the original contract coincide, viz. when the *lex solutionis* is the proper law of the original contract. If, on the other hand, the proper law is different from the *lex situs* of the debt, it becomes evident that the relationship between the assignee and the original debtor is governed by the proper law of the original contract and not by the *lex situs* of the debt. This can be seen from *Lee v. Abdy*.¹

In this case, an insurance company resident in London had insured the life of a merchant domiciled in Cape Colony. The assured had assigned the benefit of the insurance to his wife.

After his death, a dispute arose between his wife and the insurance company. The wife claimed the insurance money, but the insurance company objected on the ground that the assignment was invalid by the law of Cape Colony.

The decision depended on the question as to which law governed the assignment. If it was English law, which was the *lex situs* of the debt, then the assignment was valid; if it was the law of Cape Colony, the assignment was void. The law of Cape Colony was the *lex domicilii* of both assignor and assignee, the *lex actus* of the assignment, and also the proper law of the original insurance contract, with respect to the incident of assignment.²

The Court held that the assignment was governed by the law of Cape Colony and accordingly void.

The reasons given by Wills, J., are of particular interest. The learned Judge said: "The insurance being made by a person described in the policy as residing in South Africa, the probability is rather in favour of

¹ (1886), 17 Q.B.D. 309.

² (1886), 17 Q.B.D. 309, 314.

an assignment, if any, being made abroad. Under those circumstances I should, apart from authority, be disposed to think that the reasonable view would be that the person who contracts, knowing that an assignment of such contract may be made elsewhere than in England, must be taken to contract subject to the incident that such an assignment may be made anywhere, and that it will be governed by the law of the place where it is made."

CHAPTER X

THE LAW OF GENERAL ASSIGNMENTS

I. INTRODUCTION

1. WHAT IS A GENERAL ASSIGNMENT?

The three preceding chapters have dealt with the conflictual rules on the voluntary transfer of particular property *inter vivos*. The conveyance of immovables, the transfer of title to movables, and the assignment of choses in action have been examined in their turn. Our next task is to ascertain the legal principles applicable to so-called general assignments, i.e. the passing of property by operation of law. General assignments occur in case of death, marriage and bankruptcy. On death, the property of the deceased devolves on his successor; in case of marriage, the problem is whether and to what extent the previously separate property of the spouses becomes common property of both spouses or passes from one spouse to the other; in case of bankruptcy, the assignment of the property of the bankrupt to his trustee in bankruptcy involves intricate conflictual problems. In all these cases the transmission of assets of varying legal nature by a single act of law is in issue.

2. GENERAL PRINCIPLES.

The thoughtful student will have noticed that each of the two great provinces of the conflict of laws, which we have examined so far, is dominated by a broad principle. In the law of contract, we noticed the importance of the principle of the proper law; in the law of property, as far as particular assignments are in question, we observed the inclination of the authorities to consider the *lex situs* as the general rule. We shall see later that the third great division of the English conflict of laws, namely the law relating to the status of the person, is equally governed by a principle of general character, i.e. the personal law of the *de cuius*, which according to English law, is the *lex domicilii*. In the province of general assignments, the principles underlying the law of property and the law of the person meet. In some directions, the principle of the *lex situs* prevails, and we are not surprised to find that immovables which form part of the assets transmitted by way of general assignment are governed by this law. In other respects, the principles governing the law of the person apply; thus movables

whether of a tangible or of an intangible character transmitted by way of general assignment are, in general, governed by the personal law of the *de cuius*, and to this extent, "the often misleading maxim *mobilia sequuntur personam*"¹ has still some foundation; here the personal character inherent in succession on death and assignment on marriage prevails. These general features are, however, obscured by a number of statutory enactments. Thus, in the case of assignments on bankruptcy, almost the whole ground is covered by statute law.

It is a remarkable feature of the English conflict of laws that in the case of general assignments the various kinds of property constituting the assets of the *de cuius* are not treated identically. It is obviously desirable that the assets of the deceased or of the bankrupt, or the property of the spouse on marriage, should be transmitted by a single system of law, whatever the nature of the property forming part of the assets.² Thus, the Italian and German³ codes, whilst applying the *lex situs* to immovables in general, admit an exception to that principle in case of succession, thereby subjecting the distribution of all assets of the deceased to a single system of law. In English law,⁴ on the other hand, the principle that immovables are always governed by the *lex situs* overrides the juristic postulate that a general assignment should be governed by one law. If a person, domiciled in England and having the greater part of his property in England, owns a fishing ground in Scotland, a ranch in Saskatchewan, and a villa in Italy, the succession to his estate is determined by different laws; with respect to the main part of his property, English law applies; while with regard to the fishing ground, ranch and villa, Scottish, Saskatchewan and Italian law apply respectively. That in English law all the property forming the subject of a general assignment is not necessarily governed by the same law can be seen from the famous case of *Earl Nelson v. Lord Bridport*.⁵

Lord Nelson had been granted the Duchy of Bronte by King Ferdinand IV of Sicily. He had made a will in the English form directing the same devise and limitations for his English lands and the Bronte estate. By this will, he constituted his brother William Earl Nelson trustee and first beneficial tenant for life, with remainder over in tail male and so forth.

¹ Dicey, 5th ed., p. 347.

² See p. 160, *ante*.

³ Italy: Arts. 8 and 9 of the Preliminary Title of the Civil Code; Germany: Arts. 24 and 24 of the Introductory Act to the Civil Code.

⁴ Similarly, French law, Art. 3, alinéa 2 of the Code Civil; Niboyet, *Cours de droit international privé*, 1947, No. 620, p. 598.

⁵ (1846), 8 Beav. 547.

After the death of Lord Nelson, Earl Nelson took possession of the Bronte estate, and investiture of fief was granted to him by the King of Sicily. During his tenancy the general laws of Sicily were altered and the life tenancy in the Bronte estate was enlarged to absolute ownership. Thereupon the Earl devised the Bronte estate which he now considered his unrestricted property to his daughter, Lady Bridport.

After his death, an action was brought by Thomas Earl Nelson to whom, on the death of the Earl, the English estates had devolved according to the original will of Lord Nelson.

The issue was whether the succession to the Bronte estate was to be determined by English law, in which case the Bronte estate would, according to the original will of Lord Nelson, have devolved on the plaintiff; or whether it was governed by Sicilian law, in which case the title of the defendant Lady Bridport would prevail because her father had under that law acquired an absolute title to the estate.

Lord Langdale, M.R., adopted the latter view: "The incidents to real estate, the right of alienating or limiting it, and the course of succession to it depend entirely on the law of the country where the estate is situated. Lord Nelson, having accepted this Sicilian estate, could deal with it only as the Sicilian law allowed: he had a right to appoint a successor, but no right to modify the estate, interest, or power of disposition to which the successor was entitled by the law of Sicily. . . . The successor, though nominated by the will, took the estate under the grant; and the course of succession thereby provided (though it coincided with the first limitations in the will) might lead, as, in fact, it did subsequently lead, to a departure from them; but the consequence appears inevitable."¹

II. ASSIGNMENT ON DEATH

1. ADMINISTRATION AND DISTRIBUTION.

The conflictual rules governing assignments on death will be first considered.* Here the broad division between administration² and distribution of the estate of the deceased should be noticed. The legal rules applicable to each of these divisions are fundamentally different. The administration of the estate is governed by the *lex fori* of the court which grants probate or letters of administration; the distribution of the estate is, as far as movables are concerned, governed by the *lex domicilii* of the deceased at the time of his death, and, as far as his immovables are in question, by their respective

* For further reading: W. Breslauer, *The Private International Law of Succession in England, America and Germany*, London, 1937.

¹ At pp. 570-1.

² In the ensuing discussion the term administration includes: (1) probate of will; (2) administration in case of intestacy and (3) administration *cum testamento annexo* in case of a will without appointment of executors. The term "administrator" covers both the executor of a will, and the administrator in the case of a person having died intestate or having left a will without appointing an administrator.

leges situs. Farwell, J., in *Re Wilks*¹ made the distinction between administration and distribution very clear when commenting on the duties of English administrators—

Their duty is to administer the estate according to the law of this country; but in distributing the estate among the beneficiaries the rights of the parties must be governed by the law of domicile.²

What, then, is meant by administration and distribution? These terms are used here in a sense similar to that used in the Administration of Estates Act, 1925. Part III of this Act is entitled "Administration of Assets" and deals with the settlement of the debts and liabilities of the deceased;³ the term administration includes further the management of the estate of the deceased with a view to the clearing of the debts; and likewise the supervision of these activities by the Court. The same Act provides in Part IV for the distribution of the residuary estate to the beneficiaries entitled to the residue.

It is sometimes not easy to determine whether an act pertains to the function of administration or distribution. This point was in issue in *Re Wilks*.⁴

In this case, the deceased, who was domiciled in Ontario (Canada) at the time of his death, had left assets in different countries. Among those assets were certain shares in an English private company.

The English administrators considered that it was for the benefit of the infant successor of the deceased to postpone the sale of these shares. They were entitled to the postponement by English law, but not under the law of Ontario.

Farwell, J.,⁵ defined the issue as follows: "The question, therefore, is at what point the administrators cease to administer the estate in this country and become trustees for the purpose of distributing the estate amongst the persons interested."

The learned Judge then continued: "So long as they are performing the duties of administrators their powers and rights are to be found in the Administration of Estates Act, 1925. If, on the other hand, their only duty is to distribute the estate amongst the persons entitled according to the law of the domicile, then the powers which are given to them as administrators can no longer avail."

In the result, it was held that the power to postpone the sale was an act of administration and not of distribution.

¹ [1935] 1 Ch. 645, 648.

² The learned Judge here referred to the law determining the distribution of movables because in that case the assets consisted only of shares.

³ Including the funeral, testamentary and administration expenses (1st Schedule, Part I). On the ambiguity of the term "administration" see Earl Selborne, L.C., in *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 504.

⁴ [1935] 1 Ch. 645.

⁵ At p. 648.

2. ADMINISTRATION.

In English law, no administration of the estate of a deceased person is admitted without sanction by the Court of Probate.¹ An executor, though appointed by the testator in his will, is required to apply to the Court for probate and cannot obtain a judgment for the recovery of assets in the hands of third parties until he has been confirmed in his office by being granted probate.² An administrator derives his authority entirely from the grant of the Court, he cannot commence proceedings in Court or act otherwise before letters of administration have been granted to him.³ The grant of the Probate Court to the executor or administrator is, therefore, the focal point in the English law of administration of estates of deceased persons. This explains why the *lex fori* of the Court making the grant dominates the conflictual rules relating to administration.

A. Jurisdiction to grant probate or letters of administration. We have now to ascertain in which cases the English Probate court will assume jurisdiction to grant probate or letters of administration.

Here—as in the case of the general jurisdiction of the courts—a distinction has to be drawn between the original jurisdiction of the court and the statutory extension of this jurisdiction which is usually called the assumed jurisdiction.

(a) ORIGINAL JURISDICTION. Regarding the original jurisdiction, the rule is that the English court will grant probate or letters of administration only if some property of the deceased can be found within its jurisdiction,⁴ whether it is of immovable or movable character or consists of choses in action.

The foundation of the jurisdiction of the Court of Probate to grant administration is the existence of personal property of the deceased in England; in this case the deceased had no property in this country, and the Court therefore has no jurisdiction.⁵

It is noteworthy that the domicile of the deceased is entirely immaterial from the point of view of the jurisdiction of the Probate Court. The property must be in the jurisdiction at the time of the making of the grant, and not merely at the time of the death of the deceased. If the goods have been lawfully removed before the grant

¹ The jurisdiction of the High Court in matters of probate is defined by the Supreme Court of Judicature Act, 1925, s. 20; the Court of Probate was first constituted by the Court of Probate Act, 1857 (20 and 21 Vict. c. 77).

² See Williams, *On Executors*, 12th ed., 1930, Vol. I, p. 190; *Ingall v. Moran* (1944), 60 T.L.R. 120.

³ See Williams, *op. cit.*, Vol. I, p. 273.

⁴ *Evans v. Burrell* (1859), 28 L.J. (P.M. & A.) 82; *In the Goods of Tucker* (1864), 34 L.J. (P.M. & A.) 29; *In the Goods of Fittock* (1863), 32 L.J. (P.M. & A.) 157; Dicey, 5th ed., Rule 76, p. 337.

⁵ Sir J. P. Wilde in *In the Goods of Tucker* (1864), 34 L.J. (P.M. & A.) 29, 30.

the English Court has no jurisdiction, but, if they have been removed unlawfully, an action for trover against the remover would lie; this claim is in the nature of a chose in action and being located within the English jurisdiction would enable the English Probate Court to exercise its jurisdiction.

The rule that the jurisdiction of the English Probate Court is dependent on the situation of property within its jurisdiction has its foundation in the practice of the former ecclesiastical courts of employing part of the deceased's movable property found within their jurisdiction for the use of the salvation of the soul.¹ The jurisdiction of these courts in Probate matters was transferred later to the Court of Probate² and this court was finally merged into the Probate, Divorce and Admiralty Division of the High Court.³

(b) ASSUMED JURISDICTION. Hardship was sometimes caused owing to the fact that the Probate Court was without jurisdiction unless property of the deceased was found within its jurisdiction. This was particularly so when the grant was required only for formal purposes, e.g. for production in a foreign court.⁴ Prior to 1932, the court used to make a grant in such cases even if property of nominal value only was found within the jurisdiction, e.g. the clothes of the deceased; it thereby assumed jurisdiction in most cases where the deceased had died in England.

By the Administration of Justice Act, 1932, the jurisdiction of the Probate Court was extended to cases where there is no property within the jurisdiction. It is, however, believed that the court will still exercise the extended jurisdiction only sparingly and for collateral purposes.⁵

(c) FOREIGN GRANTS. Since a grant by the English Probate Court is an indispensable requirement for the administration of assets located in this country, the English courts do not recognise a foreign grant with respect to such assets. They refuse, therefore, to acknowledge the authority of an administrator who derives his authority from the grant of a foreign court or, what is more frequent in continental legal units, directly from a foreign legal system. Such foreign personal representatives have to apply to the English Probate Court for an English grant if they desire to exercise rights of administration in England.

¹ Lord Brougham, L.C., in *A.G. v. Hope* (1834), 1 C.M. & R. 560; and Williams, *On Executors*, 12th ed., 1930, Vol. I, p. 178.

² In 1857.

³ By the Judicature Act, 1873, consolidated by the Supreme Court of Judicature (Consolidation) Act, 1925.

⁴ See *In re Tucker* (1864), 34 L.J. (P.M. & A.) 29.

⁵ See *Halsbury's Laws of England*, 2nd ed., Vol. 14, 236, *sub tit.*, "Executors and Administrators."

There exists, therefore, no unity of administration if the assets of the deceased are spread over several jurisdictions. Contrary to the view once expressed by Lord Westbury¹ in a dissenting opinion, the domicile of the deceased does not form a *forum concursus* to which all creditors must resort and which authorises the administrator to recover the movable assets of the deceased wherever they are situated. The theory of the *forum concursus* was finally exploded by Earl Selborne, L.C., in *Ewing v. Orr-Ewing*.² In some cases, an English grant can be obtained on the strength of a foreign grant by means of the simplified procedure of resealing of foreign grants.³ According to the Supreme Court of Judicature (Consolidation) Act, 1925, a confirmation—this is the Scottish equivalent of a grant—can be resealed in the High Court, if it contains a statement that the deceased died domiciled in Scotland and left personal property both in Scotland and England. A grant of the High Court in Northern Ireland can also be resealed in the Probate Court of England;⁴ but a grant issued by a Court of Eire on or after the 1st April, 1923 cannot be resealed in England.⁵ The simplified method of resealing is also available under the Colonial Probates Act, 1892 with respect to grants made in British possessions beyond the seas, including protectorates and mandated territories;⁶ but an Order in Council under this Act can be made only if the legislature of the British possession in question has reciprocated by recognising English grants. Orders under this Act have been made, e.g. with respect to grants from the Courts of the Canadian Provinces, the Australian States, the Provinces of South Africa, New Zealand, and Newfoundland.

B. The personal representative. If a person dies intestate, English municipal law, though reserving a wide discretion to the court, has evolved certain rules of priority of persons entitled to a grant of letters of administration; in general, a person beneficially

¹ In *Enohin v. Wylie* (1862), 10 H.L. Cas. 1, 13.

² (1885), 10 App. Cas. 453, 502-3.

³ For a complete exposition of the rules relating to resealing of foreign grants see Tristram and Coote, 1, *Probate Practice*, 19th ed., 1946, p. 346 *et seq.*

⁴ Judicature Act, 1925, as amended by s. 10 of the Administration of Justice Act, 1928.

⁵ See Order of the President of the Probate Division, dated 17th March, 1925. This order applies even if the death occurred prior to the date mentioned in the context.

⁶ Colonial Probates (Protected States and Mandated Territories) Act, 1927. Similar provisions exist with regard to grants made by British Consular Courts in those foreign countries where such Courts are still in existence; The Foreign Jurisdiction Act, 1913, and the Foreign Jurisdiction (Probates) Order in Council, 1935, No. 522.

interested in the residue will be appointed administrator.¹ If the deceased has left property in several countries, it may happen that the laws of these countries differ with respect to the persons entitled to the grant.

The question arises, then, whether the English courts will grant letters of administration only to the person entitled thereto by English law, or whether they will make the grant to a foreign administrator duly appointed by a foreign court. It would be logically consistent to adopt the former course since the appointment of the administrator is clearly a matter pertaining to administration; but such rigid application of the *lex fori* would involve hardship in those cases where, the deceased having died domiciled in a foreign country, an administrator has already been appointed by the courts of that country. In these cases the English courts relax the strict *lex fori* rule and usually make the grant in favour of the person entitled to it under the *lex domicilii* of the deceased at the time of his death. It is, however, noteworthy that even in these cases the foreign *lex domicilii* does not vest in the foreign administrator a direct title to the English assets of the deceased but has merely persuasive power in the English courts.

In these cases, the administrator appointed by the courts of the foreign domicile of the deceased is called the principal administrator,² and the administrator appointed by the English Court of Probate is termed the ancillary administrator. The rule that the ancillary grant will generally be made in favour of the principal administrator was stated by Lord Penzance in *In the Goods of Hill*,³ as follows—

I have before acted on the general principle that where the Court of the country of the domicile of the deceased makes a grant to a party, who then comes to this Court and satisfies it that by the proper authority of his own country, he has been authorised to administer the estate of the deceased, I ought, without further consideration, to grant power to that person to administer the English assets.

In some foreign legal systems, mostly those based on Roman law, the administrator derives his authority not from a judicial grant, but directly from the positive law ordaining that a certain relative or other person shall be the personal representative without requiring

¹ See in particular Administration of Estates Act, 1925, s. 10.

² See further: Dicey, 5th ed., Note 27, on "Principal and Ancillary Administrators," p. 984.

³ (1870), L.R. P. & D. 289-90. This rule explains why the English Court of Probate accepts the declaration of the Court of the foreign *lex domicilii* that the *de cuius* is presumed dead, if the foreign Court has made a grant but does not accept such a declaration if no grant is made. *In the Goods of Schulhof and Wolf* (1948), 64 T.L.R. 46 (see p. 363, *post*); *In the Estate of Dowds*, [1948] W.N. 146; *In the Goods of Spenceley*, [1892] P. 255.

an appointment or sanction by the Court. In such a case the same considerations apply as in the case of the principal administrator deriving his title from the express grant of a court at the place of domicile of the deceased. Tomlin, J., observed in *In re Achillopoulos* ¹—

It seems to me that all that the Court has to do is to satisfy itself that the principal is the person who under the law of the domicile is bound to perform the functions which are imposed by our law upon an executor or administrator.

Though the English court, in general, will appoint the principal administrator to administer the English assets, the court will exercise its discretion differently in special circumstances and, e.g. grant administration to another person if the principal administrator is an infant.²

The difference between the English and foreign legal notions as to the powers of the personal representative may, further, lead to an interesting problem of characterisation.³ A foreign testator may appoint a person "executor" and authorise him to deal with property situate in England; e.g. a testator domiciled in Germany who has also property in this country may appoint a *Testamentsvollstrecker* (testamentary executor) by his last will. Can such a foreign personal representative claim to be placed in the same position as an English executor; can he, in particular, obtain an English probate or has he to apply for letters of administration *cum testamento annexo* which give him only a limited authority? The answer depends on the law of domicile because it can be assumed that the testator intended to give the personal representative the powers which such a representative usually possesses under that legal system; if the *lex domicilii* vests powers in the personal representative which are equal to those of an English executor, the English court will grant a probate; if, however, his powers have to be characterised as limited in comparison with those of an English executor, the English court will merely grant letters of administration limiting his powers to those intended by the testator.⁴

If a foreign executor or administrator engages in acts of administration in England without having first obtained an English grant, he is in the same position as a person who intermeddles in the property of the deceased without proper authority. The foreign administrator is,

¹ [1928] 1 Ch. 433, 444, 445.

² *In the Goods of Her R.H. the Duchess D'Orléans* (1859), 1 Sw. & Tr. 253; or in other contingencies, see *In the Estate of Leguia*, [1934] P. 80; see Story, s. 421, fn. to *A.G. v. Hope*.

³ In the meaning in which this term is used at p. 34, *ante*.

⁴ *In the Goods of Briesemann*, [1894] P. 260; *In the Goods of Earl* (1867). L.R. 1 P. & D. 450; *In the Goods of von Linden*, [1896] P. 148.

then, regarded an executor *de son tort*,¹ and that implies, in the words of Lord Cottenham, L.C.,² that "he has all the liabilities but none of the privileges" that belong to the office of an executor.³ Moreover, the same liability befalls a debtor who has handed over assets owed to the deceased to a foreign personal representative who has not taken out an English grant⁴ though he might not have been aware of the defect in the title of the personal representative. Thus, in *New York Breweries Co. v. A.G.*⁵—

the deceased who was domiciled in the United States of America owned shares in an English company. At the request of his American executors, who had not applied for an English grant, the company remitted dividends to the executors. The House of Lords decided that the English company had made itself an executor *de son tort* and was liable to the statutory penalty.

The rule, that a foreign administrator who intends to administer any property situate in this country must take out a grant in the English Probate Court, applies only to representative acts of the administrator. If the foreign administrator has a claim in his own right, he can pursue it here in his personal capacity without first obtaining a grant from the English court.⁶ In the same way the foreign administrator can be sued in England with respect to any personal, contractual or fiduciary liability undertaken by him and not incidental to his representative capacity,⁷ even if he has neither obtained an English grant nor been made executor *de son tort* here.

C. The administration. The administrator, whether he acts under a principal or ancillary grant, has to conduct the administration of the assets of the deceased in accordance with the *lex fori* of the court which has authorised or sanctioned his activity. By administration of the estate is understood the collection of the assets and the payment of the debts of the deceased, including the funeral, testamentary and administration expenses,⁸ and the management of the estate in connection therewith.⁹

¹ See on the position of an executor *de son tort*, Williams *On Executors*, 12th ed., 1930, Vol. I, p. 155 *et seq.*

² In *Carmichael v. Carmichael* (1846), 2 Ph. 101, 103.

³ In addition, he has to pay a penalty under the Stamp Act, 1815, and subsequent enactments.

⁴ Prof. Cheshire (3rd ed., p. 675) maintains that an exception should be admitted in favour of the *bona fide* debtor who pays to a foreign administrator. However, no English authority can be quoted which supports this departure from the strict *lex fori* rule prevailing, in general, in matters of administration.

⁵ [1899] A.C. 62; see also *Re Commercial Bank Corporation of India* (1870), L.R. 5 Ch. App. 314.

⁶ *Vanquelin v. Boward* (1863), 15 C.B. (N.S.) 341.

⁷ *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453; Dicey, 5th ed., p. 969.

⁸ P. 217, ante. ⁹ In *re Walks*, [1935] 1 Ch. 645.

In this task the administrator is confronted by two problems: which assets must he collect and which debts must he pay? The answer to both questions follows from the purpose which the administration is designed to serve, namely, to make the estate ready for distribution. This purpose is only achieved after the administrator has collected all the available property of the deceased and has satisfied all the debtors known to him whether English or foreign. In consequence, in the interests of complete administration, an administrator acting under an English grant (unless the grant is limited in terms) has duties that go beyond the territorial limits of the jurisdiction of the English courts.

As regards the collection of assets, the English administrator must leave foreign immovables to the administration of the persons entitled thereto by the respective *leges situs* of the immovables, but, with respect to the personal property of the deceased situate in foreign countries, all depends on whether it is already reduced into possession by an administrator properly appointed under the foreign *lex situs* of the personality or not. If the English administrator finds that such personality has already been collected by a duly appointed foreign administrator, he can leave the assets in his custody, but other personality has to be collected by him. These rules are deducible from *Stirling-Maxwell v. Cartwright*; ¹ they apply equally to the ordinary English administrator and the ancillary administrator deriving his title from an English grant. In addition, the title of the English administrator extends automatically to property brought within the English jurisdiction after the death of the deceased, ² unless it has previously been reduced into possession by a duly authorised foreign administrator. ³

Turning now to the payment of the deceased's debts, it is settled ⁴ that the English administrator has to satisfy foreign creditors *pari passu* with the English creditors, provided he has notice of the claim of the foreign creditors. ⁵ Westlake ⁶ observes in a passage which has found judicial approval ⁷—

¹ (1879), 11 Ch. D. 522.

² *Enohin v. Wylie*, (1862), 10 H.L.C. 1.

³ Dicey, 5th ed., Rule 131, p. 516; Westlake, 7th ed., p. 517; Cheshire, 3rd ed., p. 674.

⁴ *In re Kloebe* (1884), 28 Ch. D. 175; *In re Lorillard*, [1922] 2 Ch. 638; *In re Achillopoulos*, [1928] Ch. 433.

⁵ *In re Holden*, [1935] W.N. 52. But the English ancillary administrator need not take active steps to ascertain foreign creditors and need not advertise for them; *In re Achillopoulos*, [1928] 1 Ch. 433, 445; Dicey, 5th ed., p. 793.

⁶ Westlake, 7th ed., s. 110.

⁷ *In re Kloebe* (1884), 28 Ch. D. 175, 177 (Pearson, J.). *In re Lorillard*, [1922] 2 Ch. 638, 642 (Eve, J.).

every administrator, principal or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued or out of it, and whether owing to creditors, domiciled or resident in that jurisdiction or out of it, in that order of priority which according to the nature of the debts or assets is prescribed by the law of the jurisdiction from which the grant issued.

The rule that, in an English administration, foreign creditors can claim, in principle, *pari passu* with English creditors, seems favourable to foreign creditors. The rule has, however, a corollary which may in special cases lead to a defeat of the claims of the foreign creditors inasmuch as foreign creditors must take English law, the *lex fori* of the administration, as it stands even if it is in some respects more onerous than the *lex domicilii* of the deceased. They cannot elect to be subjected only to the favourable aspects of English law, and to be exempted from the others. Thus, if English law provides a shorter period of limitation as compared with that prevailing at the place of domicil of the deceased, the claim of the foreign creditor may well be defeated by the shorter period of limitation. In this respect the facts in *In re Lorillard*¹ are of interest :

The deceased, whose domicil had been in the United States, left assets in America as well as in England. An American and an English administrator were appointed, and the result of their administration was that there was a surplus left in England, whilst in America the debts exceeded the assets. The claims of the American creditors who could not obtain satisfaction were barred by the English Statute of Limitations, but were unobjectionable by American law.

The American Administrator claimed the surplus of the English assets for the purpose of satisfying these creditors. The beneficiaries demurred on the ground that in the English administration the rights of the American creditors were to be ascertained by English law and that the American creditors were accordingly barred by the Statute of Limitations.

Eve, J., ordered that the surplus should be handed over to the beneficiaries² and not to the American administrator on behalf of the creditors. The Court of Appeal (Lord Sterndale M.R., Warrington and Younger L.JJ.) confirmed this decision.

It should, however, be added that it is left to the discretion of the Court whether it will order the surplus to be remitted to the principal administrator or to the beneficiaries. In *Re Lorillard*,³ the Court refused to permit the remitter to the principal because this would have defeated the operation of the Statute of Limitations ; in *In re Achillopoulos*,⁴ no such complication arose and the Court had

¹ [1922] 2 Ch. 638 ; see Dicey, 5th ed., Note 27, p. 984 *et seq.*

² Who had to be determined by American Law because this was a question of distribution.

³ [1922] 2 Ch. 638.

⁴ [1928] Ch. 433.

no hesitation in ordering the transfer of the surplus to the foreign principal. The personal representative should, in such a case, before distributing the English assets, obtain the directions of the Court.

3. DISTRIBUTION.

After the administration of the estate has been concluded, the residue has to be distributed among the beneficiaries.

The English conflict of laws recognises two broad principles regarding distribution, namely that immovables are distributed according to the *lex situs*, and movables according to the *lex domicilii* of the deceased at the time of his death. These two principles govern generally all incidents of testamentary and intestate succession unless special statutes apply. It is, therefore, proposed to deal with the topic of Distribution under the following heads—

A. The succession to movables—

- (a) in case of intestate succession ; and
- (b) in case of a will.

B. The succession to immovables—

- (a) in case of intestate succession ; and
- (b) in case of a will.

A. Succession to movables. Here Story's view¹ that—

the universal principle, now recognised by the common law . . . is, that the succession to personal property is governed exclusively by the law of the actual domicil of the intestate at the time of his death,

is as true to-day as it was more than one hundred years ago. The *lex domicilii*² determines general questions of succession, e.g. whether several persons died as *commorientes*,³ and further the distribution of the movables of the intestate wherever such movables are situate. In this respect, the English conflict of laws recognises the old maxim *mobilia sequuntur personam*.⁴ The distribution of all movables or of all proceeds resulting from the sale of movables⁵ is, thus, effected according to a single law ; in this restricted field the ideal of the homogeneity of the law governing succession has been achieved.

¹ S. 48r.

² I.e. the *lex domicilii* at the time of the testator's death ; if the laws prevailing at his domicil are changed subsequent to his death, such change, even if purporting to have retrospective effect, is not recognised by the English courts ; see *In re Aganoor's Trust* (1895), 64 L.J. Ch. 521 ; *In the Estate of Musurus, deceased*, [1936] 2 All E.R. p. 1666 and Dicey, 5th ed., p. 796.

³ *In re Cohn*, [1945] Ch. 5, see p. 363, *post*. See further W. Breslau, " Foreign Presumptions and Declarations of Death and English Private International Law," in (1947) 10 *Mod. L.R.* 121.

⁴ *Pipon v. Pipon* (1744), Amb. 25.

⁵ *In re Berchold*, [1923] 1 Ch. 192 ; see above at p. 39.

(a) *AB INTESTATO*. The rule, that the beneficial distribution of movables is governed by the *lex domicilii* of the deceased at the time of his death, applies without qualification to succession *ab intestato*.¹ The capacity of the persons entitled to the residue, their portions, the priority and quality of their interest, their liability for the debts of the deceased and the conditions on which the limitation or restriction of such liability rests—these and similar questions are to be decided on the basis of the *lex domicilii* of the deceased at the time of his death.

It should, however, be observed that only questions pertaining to distribution *ab intestato* are decided in accordance with the *lex domicilii* of the deceased. It may happen that the *lex domicilii* does not provide for intestate succession at all or admits intestate succession only for certain degrees of blood relationship. If the Court has "to deal with a case where there is no distribution at all, and where there is really no *persona* to follow,"² it is left to the *lex fori* of the administration to determine the fate of the ownerless goods. If the movables are situate in England, the English Crown is entitled to the goods as *bona vacantia*, though under the *lex domicilii* another institution might be entitled to them. The Crown exercises its rights not by way of succession, "but because there is no succession."³ Thus—

In *In the Estate of Musurus, deceased*⁴ a Turkish lady, who died intestate domiciled in Turkey, left certain movables in England.

She left no relatives entitled to the movables, and, under Turkish law as it then stood, the Bait-al-mâl (the Treasury of the Moslems), was entitled to the property. According to the Koran, this institution is required to devote ownerless property to the relief of necessitous Moslems.

The issue was, in essence, whether the claim of the Bait-al-mâl to the property was in the nature of a successory right or not. In the former case, the goods belonged to the Bait-al-mâl; in the latter they went to the English Crown as *bona vacantia*.

Sir Boyd Merriman, P., analysed the right of the Bait-al-mâl in detail. He said: "To my mind, the real point is the character of the property. The reason why on the one hand goods are *bona vacantia* in this country or why they go to the Bait-al-mâl in the old Ottoman Empire on the other, is because they are in the strictest sense of the word ownerless."

Since the claim of the Turkish Institution was in the nature of a regalian claim, judgment was given in favour of the Crown.

(b) *IN CASE OF A WILL*. Our next task is to review the conflict rules governing the succession to movables when the deceased has

¹ *Pipon v. Pipon* (1744), Amb. 25; *Bruce v. Bruce* (1790), 6 Bro. P.C. 566; *Balfour v. Scott* (1793), 6 Bro. P.C. 550; *Somerville v. Somerville* (1801), 5 Ves. 750.

² *Per Kekewich, J.*, in *Re Barnett's Trusts*, [1902] 1 Ch. 847, 857. The Crown claims similar rights with respect to the ownerless property of dissolved foreign companies; see *In re Tovarishestvo Manufaktur Liudvig Rabenekh* (1944), 60 T.L.R. 467.

³ [1936] 2 All E.R. 1666.

left a will. Here the position is not as simple as in the case of intestate succession. The universal application of the *lex domicilii* is challenged by another principle. It is a fundamental maxim in the law of wills, recognised in every civilised country, that the testamentary directions of the deceased should be upheld as far as possible. This maxim accounts for two important deviations from the *lex domicilii* rule; it underlies the statutory qualifications of the *lex domicilii* under the Wills Act, 1861,¹ and explains further why a will is construed by the law intended by the testator even if it is not the law of his last *lex domicilii*. The occasional clash between these two principles will be revealed by the following examination of the conflictual rules governing the incidents of a will.

(i) *CAPACITY TO MAKE A WILL OR TO TAKE UNDER IT.* According to the Common Law, the capacity of the testator to execute a will is to be determined exclusively by the law of his domicil at the time of his death.² This rule is, however, qualified by Sect. 3 of the Wills Act, 1861, which, *inter alia*, provides that no will shall become invalid by reason of any subsequent change of domicil of the testator. We shall deal with this important provision later in detail.³

On principle, the capacity of the legatee to take under a will is a matter of construction of the legacy directed in the will because the testator is at liberty to give such directions as he pleases in this respect. It has been decided⁴ that if the legatee is a minor the legacy will be handed over to him as soon as he attains majority as ascertained either under the *lex domicilii* of the testator at the time of his death or under the minor's own law of domicil at the time of his coming of age, whichever alternative occurs earlier. It is believed that this rule is based on the assumption that such a construction of the will accords with the intention of the testator.

(ii) *FORMAL VALIDITY OF THE WILL.* The question as to the form which a will disposing of movables⁵ situate in several countries must satisfy is a practical problem of prime importance. The solemnities surrounding the execution of a testamentary disposition vary greatly in different countries. In some countries, the law prescribes certain formalities, e.g. the signature and attestation of the will. Thus, according to the Wills Act, 1837, an English will must be in writing signed by the testator in the presence of two witnesses, who

¹ Lord Kingsdown's Act.

² *In the Goods of Maraver* (1828), 1 Hagg. Ecc. 498.

³ At p. 239, *post*.

⁴ *Re Hellmann's Will* (1866), L.R. 2 Eq. 363; *Re Schnapper*, [1928] Ch. 420.

⁵ The form of wills relating to immovables is discussed at p. 242, *post*.

must each sign their name in the presence of the testator. Other laws admit wills executed in a less stringent form, e.g. in Scotland the holograph testament is regarded as valid, at least so far as dispositions of personality are concerned.¹ The adoption of an insufficient form usually invalidates the testamentary disposition.

(α) *The Common Law rule.* According to English Common Law, a testamentary disposition of movables must be executed in the form provided by the law of the domicile of the testator at the time of his death.² The Common Law considers a will invalid if executed in a form other than that admitted by the law of the last domicile of the testator. This view was expressed in *Bremer v. Freeman*,³ a case which revealed the stringency of the Common Law rule and evoked great alarm; it induced Parliament to change the law by passing the Wills Act, 1861⁴ (Lord Kingsdown's Act). In the above case it was said⁵ that the Judicial Committee did

"not wish to intimate any doubt that the law of the domicile at the time of the death is the governing law (see Story, *Conflict of Laws*, s. 473.)"

The Board based its view entirely on the *mobilia sequuntur personam* rule.

The Common Law Rule is not abolished by Lord Kingsdown's Act. "It applies to all wills whether of British subjects or of aliens, which, for whatever reason, do not fall within"⁶ the provisions of that Act. In its positive aspect, namely that a will of movables executed according to the law of the testator's last domicile is valid, the rule offers an alternative to the methods of execution of a will authorised by the Act. In its negative aspect, namely that a will not executed in the manner mentioned is invalid, it is still operative in those cases not protected by the Act. It is important to notice that the old Common Law rule still operates though in a restricted sphere, e.g. if the English courts were called on to examine the validity of a holograph will made in Paris by a Frenchman domiciled at the time of his death in Quebec, they would decide this question strictly by the law of Quebec; if that law does not recognise the will as valid, they will consider it invalid though the will is valid according to French law.

(β) *Lord Kingsdown's Act, Sects. 1 and 2.* In the case of testators

¹ *In re Priest*, [1944] 1 Ch. 58.

² This law may, of course, admit several forms at the option of the testator. Then any one of these forms is recognised by the Common Law.

³ (1857), 10 Moo. P.C. 306.

⁴ On the history of the Act, see Cheshire, 3rd ed., p. 685 *et seq.*

⁵ At p. 358.

⁶ Dicey, 5th ed., p. 806; Dicey refers to *In the Goods of Lacroix* (1877), 2 P.D. 94; this case was, however, decided on the basis of Lord Kingsdown's Act.

who are British subjects, alternative arrangements to the Common Law rule have been introduced by Sects. 1 and 2 of the Wills Act, 1861. The Act is entitled "An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects." The first two sections of the Act deal with the formal validity of the will; they run as follows—

1. Every Will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland,¹ to Probate, and in Scotland to Confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's Dominions where he had his domicile of origin.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland¹ to Probate and in Scotland to Confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Before considering the different possibilities offered by these provisions, it is convenient to make some general observations relating equally to each of these contingencies. First, the Act applies to the "personal estate" of the *de cuius* and not to his "movables"; the legislator has adopted the classification of English internal law and not that of the English conflict of laws;² in consequence, a will disposing of English leaseholds falls within the Act.³ Secondly, both sections of the Act are expressly confined to testators who are British subjects, natural born and naturalised British subjects⁴ alike being protected by the Act. A testator who at the time of the execution of the will was not a British subject does not fall within the section. Thus, a British woman, who lost her British nationality by marriage to a foreigner,⁵ cannot avail herself of the section, if she makes a will after her marriage,⁶ but the sections will protect her if she has executed

¹ Now exclusive of Eire.

² *Lyne's Settlement Trusts*, [1919] 1 Ch. 80; *Re Cartwright*, [1939] 1 Ch. 90; *Re Cuckiffe's Will Trusts*, [1940] 2 All E.R. 297; and p. 39, *ante*.

³ *In re Grassie*, [1905] 1 Ch. 584.

⁴ *In the Goods of Gally* (1876), 1 P.D. 438.

⁵ Before the coming into force of the British Nationality Bill, 1948; see cl. 14 of the Bill.

⁶ *In the Goods of the Baroness von Buseck* (1881), 6 P.D. 211. *Bloxham v. Favre* (1883), 8 P.D. 101, *aff.* (1884), 9 P.D. 130.

the will before marriage. Thirdly, it should be noticed that the sections deal exclusively with the formalities to be observed on the execution of the will. Other incidents of the will, such as capacity or essential validity, are not affected by these two sections, whereas Sect. 3 of the Act does extend to other incidents. The limited operation of Sects. 1 and 2 of the Act has been indicated by Buckley J. in *In re Grassi*¹—

Therefore Sect. 1 of that Act does not say that the will shall be valid for all purposes. The section says, in effect, that the will shall be valid for the purposes of being admitted to probate, and will then take its place and be effectual for such purposes following on probate as the law of England allows.

We have now to consider the alternatives to the Common Law rule offered by the Act. Here a distinction has to be drawn according to whether the will was executed outside or within the United Kingdom; ² in the first case Sect. 1, and in the second case, Sect. 2 of the Act applies.

If the will of a British subject is made outside the United Kingdom, the choice lies, according to the Act, between—

- (a) the law of the place where the will was made (*lex actus*);
- (b) The law of the testator's domicile at the time of the execution of the will; and
- (c) the law of the testator's domicile of origin if he had his domicile of origin in the British dominions.

If the will was made within the United Kingdom, then the Act provides only one alternative to the Common Law rule that the form of the *lex domicilii* at the time of the death has to be satisfied. This alternative is the law of the place where the will was executed (*lex actus*). If the will appears to satisfy the forms of both *leges*, it has to be ascertained which of these forms the testator intended to use, and the formal validity of the will, and matters depending thereon, are determined by the law applying to that form. Thus, in *In re Priest*³—

the testator who died domiciled in England, executed in Scotland a holograph will attested by two witnesses whereby he gave half of his real and personal estate to the wife of one of the witnesses. The question before the Court was whether the will was made in the English or Scottish form. In the former case the gift was invalid by virtue of the Wills Act, 1837, s. 15; in the latter case the gift was valid because an unattested

¹ [1905] 1 Ch. 584, 592.

² The United Kingdom does not include Eire (art. 2 of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923).

³ [1944] Ch. 58.

holograph will disposing of personalty is valid by the law of Scotland and the attestation could be disregarded. Bennett, J., held that the testator intended to make the will in the English form and that, consequently, the gift was invalid.

(γ) *Summary*. The following summary shows in which cases wills dealing with personalty will be regarded as formally valid and consequently will be admitted to probate by the English courts. (In this summary, the italic text indicates the Common Law rule, and the references to sections relate to Lord Kingsdown's Act.)

I. Wills of British subjects

[A] made within the United Kingdom in accordance with—

[a] *the lex domicilii of the testator at the time of his death.*

[b] *the lex actus of the will* [Sect. 2] ;

[B] made out of the United Kingdom in accordance with—

[a] *the lex domicilii of the testator at the time of his death, or*

[b] *the lex domicilii of the testator at the time of the execution of the will* [Sect. 1] or

[c] *the lex domicilii of origin (if within the British dominions) of the testator* [Sect. 1], or

[d] *the lex actus of the will* [Sect. 1].

II. Wills of aliens—

[A] complying, if the alien dies domiciled within the United Kingdom, with—

[a] *the lex domicilii of the testator at the time of his death.*

[b] *the lex domicilii at the time of the execution of the will, since if, subsequently to making a valid will, the alien changes a foreign domicile for a United Kingdom domicile, the mere change of domicile will not invalidate the will* [Sect. 3].¹

[B] complying, if the alien dies domiciled out of the United Kingdom, with—

the lex domicilii of the testator at the time of his death.

(iii) *ESSENTIAL VALIDITY*. All the incidents of a will which do not fall under the category of testamentary capacity and testamentary formalities are comprised in the term “essential validity of the will.” This term covers, in particular, legal restraints on the right of the testator to alienate his property on death, the construction of his will and the exercise of general and special powers granted to the testator by third persons. In the sphere of the essential validity of a testamentary disposition of movable property, we meet again the rivalry between the *lex domicilii* of the testator at the time of his death and the law intended by the testator in his last will ; here these two principles are, as we shall see, sometimes in open conflict. It is intended to arrange our observations under three heads, namely

¹ See p. 239, *post*.

- (α) restraints on the bequest of movable property,
- (β) the construction of testamentary dispositions relating to movables, and
- (γ) the exercise of a power by will.

(α) *Restraints on the bequest of movables.* Whether a testamentary disposition relating to movables is invalid as contrary to restraints on the right of the testator to dispose of the movables by will, is determined exclusively by the *lex domicilii* of the testator at the time of his death. This law may restrict the testamentary liberty of the testator for two reasons, first, because it does not favour the object of the testamentary disposition, and secondly, because it disapproves the disinheritance of persons who by virtue of their relationship to the testator should not be excluded from their portions without cogent reasons. Restrictions of the first kind¹ are known to the English law, e.g. the former Thellusson Act, which is now re-enacted in Sect. 164 of the Law of Property Act, 1925. These restrictions apply, as far as movables are concerned, to all testators who have died domiciled in England.² Neither Lord Kingsdown's Act³ nor the fact that the will is formally valid and has, therefore, been admitted to probate,⁴ renders valid wills contravening these restraints. Restraints of the second kind have first been introduced into English law by the Inheritance (Family Provision) Act, 1938,⁵ which provides that upon certain conditions the court has power to vary the testamentary disposition when of opinion that the will does not make reasonable provision for certain members of the testator's family, i.e.—

- (a) the wife or husband ;
- (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself ;
- (c) an infant son ; or
- (d) a son who is, by reason of some mental or physical disability, incapable of maintaining himself.

The Act applies to all persons who, after 13th July, 1939, die domiciled

¹ These restraints are sometimes considered as limiting the testamentary capacity of the testator (*In re Groos*, [1915] 1 Ch. 572).

² *Macdonald v. Macdonald* (1872), L.R. 14 Eq. 60.

³ Dicey, 5th ed., p. 808.

⁴ In particular, the decree of the Probate Court is not conclusive with respect to the domicile of the deceased ; *Whicher v. Hume* (1858), 7 H.L. Cas. 124, 156 (Lord Cranworth) ; *Concha v. Concha* (1886), 11 App. Cas. 541, 551 ; *Thornton v. Curling* (1824), 8 Sim. 310 ; *Campbell v. Beaufoy* (1859), Johns. 320.

⁵ The Act is similar to the New Zealand Family Protection Acts, 1908 and 1921, and the decisions of the Courts of New Zealand on the construction of these Acts are of persuasive authority for the interpretation of the English Act of 1938 ; see S. A. Wiren, " Testator's Family Maintenance in New Zealand," in 45 *L.Q.R.* 1929, 378.

in England¹ and, though providing that the Court shall have regard to the nature of the property representing the testator's net estate,² does not contain any restriction with respect to any particular kind of property. In view of the very wide definition of the term "net estate" contained in the Act³ it would appear that the court is authorised to vary the will even though the property left by the testator consists partly of immovables or movables situate abroad.⁴ If, on the other hand, the testator dies domiciled abroad and the foreign *lex domicilii* provides for such a restraint, a testamentary disposition of movables is invalid if failing to comply therewith.⁵

The principle that the *lex domicilii* of the testator at the time of his death determines whether his liberty of testation is subject to any legal restraints may lead to a remarkable result. A bequest may be enlarged—or conversely diminished—if the testator has changed his domicile subsequent to the execution of his will. Thus, in *Re Groos*⁶—

the testatrix who was domiciled in Holland made a will leaving her entire estate to her future husband "with reservation only of the legitimate portions" due to her relations. Subsequently the testatrix acquired an English domicile and died domiciled here. According to Dutch law, three quarters of the residue had to go to the surviving children as their legal portions, but according to English law the children were not entitled to any legal portions and the husband could claim the entire residue.

Sargant, J., decided the case on the basis of English law as being the *lex domicilii* of the testatrix at the time of her death. "The legitimate portion having been swept away by reason of the change of domicile, the result is, not that the meaning of the will is in any way altered, but that the area of the property over which the will takes effect is enlarged and the whole of the testatrix's residue instead of one-fourth share only goes to the husband."

Such enlargement takes place, however, only if the will can be construed as leaving the entire residue to the legatee. It is believed that no enlargement takes place if the will is subject to a different interpretation, e.g. if the testator intended to leave to the legatee a gift of equal value to the legal portion under the law of the domicile at the time of the execution of the will; in such a case the gift is limited to an amount measured on the basis of that legal portion.

(β) *Construction of testamentary dispositions of movables.* With respect to the law determining the construction of a testamentary disposition of movables, there exists a conflict of opinion between the writers on the subject which, it may be said with all respect, does

¹ S. 6.

² S. 1 (5).

³ S. 5 (1).

⁴ See the New Zealand case *In re Roper (deceased)*, [1927] N.Z.L.R. 731.

⁵ *Campbell v. Beaufoy* (1859) Johns. 320; *Thornton v. Curling* (1824), 8 Sim. 310. In *re Groos*, [1915] 1 Ch. 572.

⁶ [1915] 1 Ch. 572.

not appear to be warranted by the judicial authorities. Story maintains¹ that the *lex domicilii* of the testator at the time of his death governs, unless it is "manifest" that the testator had another law in mind. This rule is substantially followed by Dicey.² Westlake³ infers from the provision of Sect. 3 of Lord Kingsdown's Act (which provides that the construction of the will shall not be altered by reason of a subsequent alteration of the domicil of the testator) that the *lex domicilii* of the testator at the time of the execution of the will governs its construction. Professor Cheshire,⁴ whilst emphasising the importance of the testator's intention, states that, if the formal validity of the will is based on Sect. 1 or Sect. 2 of Lord Kingsdown's Act, a rebuttable presumption exists in favour of that alternative under which the will has been admitted to English Probate.

No discussion of these theoretical differences appears necessary because the rules deducible from the English cases are, it is submitted, quite clear. According to the English conflict of laws, a will disposing of movables has to be construed according to the law expressly or presumably intended by the testator. The English courts give full effect to such intention. The position is analogous to that of the proper law of the contract but with the qualification that here the intention of one person, the testator, is decisive and not the concurrent intention of several parties. The deduction would, therefore, appear warranted that the construction of a will is governed by the proper law of the will.⁵

If the testator has expressly specified the law which shall apply to the construction of the will, that law governs the interpretation of the will. The authorities concur in this view,⁶ which has found a clear expression in the following observations of the Solicitor-General in his argument in *Anstruther v. Chalmer*⁷—

If there had been a memorandum indorsed on a will so made and deposited, declaring that it was the intention of the party that the instrument should take effect as a Scottish will, and be construed according to the law of Scotland, there can be no doubt that the Court would give effect to it accordingly.

If the testator has omitted to declare the law applicable to the

¹ Story, s. 473, 479g; see Dicey, 5th ed., p. 816.

² Dicey, 5th ed., Rule 196 and exception 1.

³ Westlake, 7th ed., p. 155.

⁴ Cheshire, 3rd ed., p. 707.

⁵ See Greene, M.R., in *Duke of Marlborough v. A.G.*, [1945] Ch. 78, 79-80.

⁶ *Bradford v. Young* (1885), 29 Ch. D. 617; *Trotter v. Trotter* (1828), 4 Bli. (N.S.) 502, 505; Story, s. 479 (*ante*, p. 233); Dicey, 5th ed., exc. to Rule 196; Westlake, 7th ed., para. 123 (end); Cheshire, 3rd ed., p. 704.

⁷ (1826), 2 Sim. 1, 4; see also *per* Fry, L.J., in *Bradford v. Young* (1885), 29 Ch. D. 617, 625 and *per* Stirling, J., in *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442, 453.

construction of his will, his presumed intention has to be inferred from all the surrounding circumstances.¹ Here the English courts have developed two presumptions which are of a rebuttable character, as are all presumptions designed to assist in the determination of the proper law. The principal presumption is that the law of the testator's domicile at the time when the will was made governs the interpretation of the will, in particular, if it coincides with the law of the domicile of the testator at the time of his death.² The second presumption governing the interpretation of a will provides that if the testator has adopted technical terms peculiar to a particular legal system, the inference is justified that he intended that legal system to govern the interpretation of his will.³ Thus, *In re Allen*,⁴

a testator who was domiciled in South Africa, provided in his will that the references to "personal chattels" in the will should be construed as defined in Sect. 55 of the (English) Administration of Estates Act, 1925. Cohen, J., held that, in view of this clause (and certain supporting reasons), it was clear from the face of the will, that the testator intended its provisions to be construed by English, and not South African law.

(γ) *The exercise of a power by will.* English wills and settlement often confer on a person the power to appoint somebody to a benefit under the will or settlement concerned. In these cases the testator or settlor is called the donor; the person entitled to exercise the power is the donee; and the person in whose favour the power is exercised is the appointee. Such powers are either general or special powers. General powers can be exercised in favour of any person including the donee; special powers can only be exercised in favour of specified persons or a specified class of persons, e.g. the lawful children of X. Powers of appointment, already highly technical in the realm of municipal equity, give rise to a number of complicated conflictual problems. Most of them are actually questions of the proper construction of a will, either of the donor's will⁵ or of that of the donee by which he exercises the power. They are, in principle, governed by the same considerations which have just been explained as applying to the interpretation of a will.

¹ Eve, J., in *Re Cunningham*, [1924] 1 Ch. 68, 72.

² *Trotter v. Trotter* (1828), 4 Bli. (N.S.) 502; *Anstruther v. Chalmers* (1825), 2 Sim. 1; *Yates v. Thomson* (1835), 3 Cl. & F. 544; *Bradford v. Young* (1885), 29 Ch. D. 617; *Campbell v. Campbell* (1866), L.R. 1 Eq. 383; *In re Cunningham*, [1924] 1 Ch. 68; *In re Fergusson's Will*, [1902] 1 Ch. 483.

³ Dicey, 5th ed., Exc. to Rule 195; *In re Allen*, (1945) 114 L.J. Ch. 298; *In re Price*, [1900] Ch. 442, 452; *Studd v. Cook* (1883), 8 App. Cas. 577; *Chia Khwee Eng v. Chia Poh Choon*, [1923] A.C. 424; *Choa Eng Wan v. Choa Giang Tee*, [1923] A.C. 469.

⁴ (1945), 114 L.J. Ch. 298.

⁵ Or settlement.

Thus, the question, whether the will of the donee exercising the power of appointment is valid regarding its form, depends entirely on the interpretation of the provisions laid down in the will¹ of the donor, and relating to the exercise of the power. If he has prescribed certain formal safeguards, such as attestation by a number of witnesses or execution in the English form, the donee cannot exercise the power otherwise than by a will satisfying those requirements.² In most cases, however, the donor gives the donee some latitude, for instance by providing that the donee shall be at liberty to exercise the power "by his will" or "by his duly executed will." In such cases it is not necessary for the will to comply with the formal requirements governing the execution of the instrument from which the power is derived; but it is sufficient for the proper exercise of the power that the will of the donee is executed in a form recognised by English law. Thus, a will, executed according to one of the alternatives of Lord Kingsdown's Act or made in the form prescribed by the law of the domicile of the donee at the time of his death,³ is considered as authorising the appointment in conformity with the terms of the power.

In the same way, the problem whether the donee did actually exercise a power of appointment given to him, is a question of construction—here, of course, of the will of the donee. If the donee expressly states in his will that he is exercising the power entrusted to him, no dispute can arise at all. If, however, the donee employs general language only, e.g. if he says that he leaves all his residuary personalty to X, the courts are frequently called upon to interpret this bequest and to decide whether it represents, by implication, an exercise of a power of appointment given to the donee. English municipal law provides here an important rule of construction. The Wills Act, 1837, Sect. 27, lays down that if the donee has been granted a general power of appointment, a general bequest by the donee shall be construed as an exercise of this power in favour of the general legatee. It was, at one time, doubtful whether the same rule of construction applied if the donee died domiciled abroad or whether his will was, with respect to personalty, governed by the foreign *lex domicilii*. It has now been settled that the rule of construction

¹ Or settlement.

² *Baretto v. Young*, [1900] 2 Ch. 339; *In re Walker*, [1908] 1 Ch. 560.

³ *D'Huart v. Harkness* (1865), 34 Beav. 324; *In re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; *In re Wilkinson, Butler v. Wilkinson*, [1917] 1 Ch. 620; *In re Simpson, Coultis & Co. v. Church Missionary Society*, [1916] 1 Ch. 502; *In re Kirwan's Trusts* (1883), 25 Ch. D. 373 and *Hummel v. Hummel*, [1898] 1 Ch. 642 contain different dicta, but they have been repeatedly dissented from).

provided by the section in question applies also to such foreign wills.¹ The main reason for this view is advanced by Peterson, J., *In re Lewal's Settlement Trusts*,² viz., that the foreign *lex domicilii* of the donee "does not know anything of powers of appointment and would require to be informed what a general power of appointment was and in what manner it might be exercised, and the answer to this question must involve the effect of Sect. 27." In short, the foreign *lex domicilii* of the donee governing the interpretation of the donee's will is considered as adopting the English rule of construction, at least if the institution of the general power is unknown to the foreign *lex domicilii*.

(iv) *REVOCATION OF A WILL BY OPERATION OF LAW.* We have now to examine the cases where the law considers a testamentary disposition of movables as revoked although the testator has never expressed his desire—and perhaps has never had the desire—that his will should be invalid. This conclusive presumption as to the revocation of a will by virtue of rules of the positive law may occur in two instances.

(α) *Revocation of a will by subsequent change of domicil.* First, the principle of the English conflict of laws, that a will relating to movables is tested by the *lex domicilii* of the testator at the time of his death, may lead to a supervening invalidation of the will. A testator, domiciled at the time of the execution of the will in country *A*, may make a will valid in form and essence by the law of *A*; subsequently, he may change his domicil to country *B* where stricter legal rules relating to the validity of a will prevail and where the will would not be considered valid. If the testator has died domiciled in country *B*, the question arises whether the will of the testator is revoked by his subsequent change of domicil.

To answer this question on the basis of the Common Law, we have to consider American law, because in England the problem is governed by statutory provisions. The American authorities agree that the will is deemed revoked if the testator changes his domicil to a country whose law provides stricter requirements for the validity of the will than those in the country from which he comes.³ Consequently, at Common Law, the strict application of the *lex domicilii* principle

¹ *In re Simpson, Coutts & Co. v. Church Missionary Society*, [1916] 1 Ch. 502; *In re Wilkinson's Settlement, Butler v. Wilkinson*, [1917] 1 Ch. 620; *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391 (the former decisions in *In re D'Este's Settlement Trusts, Poulter v. D'Este*, [1903] 1 Ch. 898 and *In re Scholefield, Scholefield v. St. John*, [1905] 2 Ch. 408 have been constantly dissented from).

² [1918] 2 Ch. 391, 397.

³ American Restatement, para. 306 (d), p. 388; 2 Beale, 2, para. 307, 1, at p. 1034; *Nat. v. Coons* (1847), 10 Miss. 543; *Moultrie v. Hunt* (1861), 23 N.Y. 394.

leads to the invalidity of a will which presumably was not intended to be invalid by the testator.

In English law this position is substantially qualified by Lord Kingsdown's Act. Sect. 3 of which provides—

No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

The beneficial effect of this section is not restricted to the form of the will (as is the case with Sect. 1 and Sect. 2 of the Act), but extends, it is believed,¹ likewise to all incidents pertaining to the essential validity of the will. Considerable difference of opinion exists among textbook writers as to whether the section, like Sects. 1 and 2 of the Act,² applies only to wills of British subjects, or whether it extends also to wills of aliens. Dicey³ and Westlake⁴ advocate the extensive, Professor Cheshire⁵ the restrictive, interpretation of Sect. 3. Professor Cheshire's⁵ argument is based on the history of the enactment, on its object as revealed in Lord Kingsdown's speech in Parliament, and on the title of the Act in the Statute Book which is "an Act to amend the laws with respect to wills of personal estate made by British subjects." Professor Cheshire interprets Sect. 3 as, in essence, merely repeating Sects. 1 and 2. His argument is, it is submitted, neither conclusive nor supported by judicial authority. He is well aware that the history of the Act as well as parliamentary speeches are matters extraneous to the interpretation of the Act, which according to the general rule must be explained from the language employed by the legislature. It is to be particularly noticed that Sects. 1 and 2 refer expressly to British subjects whilst Sect. 3 omits any such reference. The view that the scope of Sect. 3 extends to wills of aliens is, therefore, more in accord with the natural meaning of its language. Professor Cheshire's deduction from the title of the Act seems equally inconclusive if we consider that the courts had no difficulty in holding that an Act entitled the Fire Prevention (Metropolis) Act, 1774, applied to the whole of England.⁶ Moreover, Professor Cheshire's argument is at variance with a dictum of Gorell Barnes, J., in *In the Estate of*

¹ It is submitted that the term "construction" in s. 3 of Lord Kingsdown's Act has a similar meaning to "interpretation" in the Bills of Exchange Act, 1882, s. 72 (2), (p. 137, *ante*). A wide interpretation of the term "construction" in s. 3 is likewise suggested by Westlake, 7th ed., p. 122, whilst Dicey, 5th ed., p. 824 and Cheshire, 3rd ed., p. 361 are in favour of a restricted interpretation.

² P. 229, *ante*.

³ Dicey, 5th ed., Rule 197, p. 820.

⁴ Westlake, 7th ed., s. 85, p. 122.

⁵ Cheshire, 3rd ed., p. 691.

⁶ *Ex parte Gorely* (1864), De G. J. & S. 477; *Sinnett v. Bowden*, [1912] 2 Ch. 414.

Groos.¹ In this case the validity of a will of a Dutch woman who died domiciled in this country was in issue. Gorell Barnes, J., observed ²—

It does not seem reasonable to hold that in this case Sect. 3 is to be limited merely because, in the title, the Act is described as an Act to amend the law with respect to wills of personal estate made by British subjects. I am of opinion that the Act ought not to be construed in the restricted sense.

We conclude, therefore, that Sect. 3 of The Wills Act, 1861, unlike Sects. 1 and 2, extends to wills of aliens. The wills of every class of alien are, however, not protected by this provision which applies only to the wills of aliens who die domiciled in England,³ for no English Act of Parliament is interpreted as having extra-territorial effect in the absence of an express provision to that effect. So if a Frenchman changed his domicile to some American State where the old Common Law rule still applied and died domiciled there, a holograph testament made by him whilst he was domiciled in France would not be considered as protected by Sect. 3 of Lord Kingsdown's Act if the validity of the will were tested in the English courts.

(β) *Revocation of a will by subsequent marriage.* The second instance of revocation of a will by operation of law arises in the following circumstances. It is enacted by Sect. 18 of the Wills Act, 1837, as amended by Sect. 177 of the Law of Property Act, 1925, that every will shall be considered as revoked by the marriage of the testator or testatrix unless the will was expressed to be made in contemplation of a particular marriage. It is not stated in the section whether it refers to spouses whose matrimonial domicile at the time of the marriage is in England, or to those who die domiciled in England. In the former case the test employed by the Act would be the law of marriage; in the latter case it would be the law of wills. If the revocation of an ante-nuptial will forms part of the matrimonial law, the will of a spouse, domiciled at the time of his or her death abroad, would be only invalidated if, at the time of the marriage, the husband was domiciled in England. If, on the other hand, the rule of revocation forms part of the testamentary law, the will of a spouse who died domiciled in England would be invalidated by marriage subsequent to the making of the will, wherever the spouses were domiciled at the time of the celebration of the marriage. The practical difference between these two views is considerable.

An examination of the general intent of the Wills Act, 1837, shows

¹ [1904] P. 269.

² At p. 273.

³ See Dicey, 5th ed., p. 820, Comment to Rule 197.

that the Act considers the revocation of a will by marriage as pertaining to the matrimonial and not to the testamentary law. The legislator conclusively presumes that the testator rescinds his ante-nuptial will in view of the new interests and duties arising from the marriage bond. The view that the revocation of the will on the occasion of the marriage forms part of the matrimonial and not of the testamentary law is expressed by Lord Macnaghten¹ and Vaughan Williams, L.J.,² and is supported by Professor Keith³ and Professor Cheshire.⁴ Since it follows already from these general considerations that an ante-nuptial will of a spouse married under a foreign *lex domicilii* is not invalidated by reason that he or she subsequently acquired an English domicile, it is not necessary to invoke here Sect. 3 of Lord Kingsdown's Act.⁵

B. Succession to immovables. The succession to immovable property is, as already stated, governed by the *lex situs* of the immovable in question.

The descent and heirship of real estate are exclusively governed by the law of the country within which it is actually situate. No person can take, except those who are recognised as legitimate heirs by the laws of that country; and they take in the proportions and the order which those laws prescribe. This is the indisputable doctrine of the Common Law.⁶

The *lex situs* governs, in principle, the devolution of immovable property *ab intestato* as well as the testamentary succession thereto. The application of the *lex situs* to the devolution of immovable property on death is merely an instance of a much broader rule, namely the principle that all incidents pertaining to the transfer of immovable property are governed by the *lex situs* of the property. The universal application—with certain exceptions—of the *lex situs* principle to general and particular assignments of immovables justified, as will be remembered, in our chapter on the law of immovables, occasional references to cases decided on issues relating to the succession of immovables.⁷ For this reason, several textbook writers including Dicey⁸ and Professor Cheshire⁹ approach the law of succession to

¹ In *De Nicols v. Curlier*, [1900] A.C. 21, 33.

² In *Re Martin, Loustalan v. Loustalan*, [1900] P. 211, 240; *ante* at p. 82.

³ In *University of Toronto Law Journal*, Vol. I, 1936, p. 255.

⁴ 3rd ed., p. 692.

⁵ This section was invoked in *In the Goods of Reid* (1866), L.R. 1 P. & D. 74; and in *The Estate of Groos*, [1904] P. 269.

⁶ Story, s. 483, 7th ed., Boston, 1872, p. 615.

⁷ P. 160, *ante*.

⁸ Dicey, 5th ed., Rule 150, p. 589, but see Note 25 on "Questions where deceased leaves property in different countries."

⁹ Cheshire, 3rd ed., p. 732.

immovables not from the viewpoint of the law of succession, as has been done in this treatise, but from that of the law of immovables.

(a) THE RULE OF THE *LEX SITUS*. Generally "every question as to the devolution of immovables either under a will or in case of intestacy is to be determined by the law of the country where the immovables are situate."¹ This has been decided with regard to the distribution *ab intestato*,² the capacity to make a will³ or to take thereunder,⁴ the form⁵ and essential validity⁶ of the will, the nature and limitations of the devised estate,⁷ and the restraints on alienation applicable to the devise.⁸ In particular, a foreign will which relates to English land and infringes the English rules against perpetuities or accumulations, or contravenes the English Mortmain Acts, is void. It is immaterial that the testator died domiciled abroad; that the main part of his assets is situate abroad; or that the will was executed abroad or exhibited any other foreign element.

(b) SPECIAL CASES. We have now to consider two cases which represent exceptions from the *lex situs* rule in its application to the assignment of immovables on the death of their owner. These exceptions extend, first, to the construction of wills relating to immovables, and secondly, to dispositions applying alike to the immovable and movable part of the estate, such as those giving rise to the heir's right of recourse and the question of election.

(i) CONSTRUCTION OF WILL RELATING TO IMMOVABLES. It may be recalled⁹ that testamentary dispositions relating to movables have to be construed according to the proper law of the will, and that, as in the case of the proper law of the contract, several rebuttable presumptions exist for the ascertainment of the proper law of the will. These presumptions are in favour of the law of the testator's domicile at the time of the execution of his will, and further of the law the technical terms of which have been adopted by the testator.

In the case of testamentary dispositions relating to immovables, it can hardly be denied that the same principle, viz. the proper law of the will, governs the construction of the disposition. It is, however, doubtful whether the same presumptions apply as in the case of

¹ Dicey, 5th ed., p. 972.

² *Duncan v. Lawson* (1889), 41 Ch. D. 394; the Irish Case *In re Rea, Rea v. Rea*, [1902] 1 I. R. 451.

³ *Re Hernando* (1884), 27 Ch. D. 284.

⁴ *Birtwhistle v. Vardill* (1839), 7 Cl. & F. 895; *ante*, p. 167.

⁵ *Pepin v. Bruyère*, [1900] 2 Ch. 504; *Coppin v. Coppin* (1725), 2 P.W. 291; *Dundas v. Dundas* (1830), 2 Dow & Cl. 349.

⁶ *Freke v. Lord Carbery* (1873), L.R. 16 E. 9, 461.

⁷ *Ante* p. 169. ⁸ *Pike v. Hoare* (1763), 2 Eden 182. ⁹ See p. 235, *ante*.

dispositions relating to movables, or whether those presumptions are replaced by another equally flexible presumption in favour of the *lex situs* of the immovable in question.

The authorities confirm Dicey's statement that "there seems no reason to make an exception in the case of wills of immovables to the general rule."¹ Professor Cheshire also strongly advocates the view that the law of the testator's domicile at the time when the will was made is presumed to be the proper law of the will.² However, in case of dispositions of immovables, the circumstances more frequently permit the inference of a different intention on the part of the testator, or, in other words, the presumptions in question have less persuasive force. If the testator has executed a separate will relating to his foreign land in the form and manner recognised by the *lex situs* of the land, it will be assumed that he intended that the will should be interpreted according to that law. If, of course, technical terms from a particular legal system are employed, a presumption is invoked in favour of the law from which they are borrowed. This rule with respect to immovables was affirmed in *Studd v. Cook*.³

In this case, the will of the testator who lived and died domiciled in England contained dispositions regarding his Scottish land which were expressed in English technical terms. The dispositions were construed according to English law.

The case is reported under the following headnote:

"Where a testator, in a foreign will, expresses himself in technical language of the place where made and where he is domiciled, to obtain the intention the technical terms must be interpreted by the meaning put on them in the system of law from which they are borrowed."

(ii) *DISPOSITIONS APPLYING ALIKE TO IMMOVABLES AND MOVABLES.* The second case where the stringent *lex situs* rule otherwise applicable to the transmission of immovables on death has been relaxed concerns dispositions governing alike the immovable and movable parts of the estate of the deceased. No question of classification arises here. The problem is not whether a particular property is a movable or immovable, but the disposition in question relates so comprehensively to both kinds of the estate that it is hard to say whether it is governed by the *lex situs* (which applies to immovables) or by the *lex domicilii* of the testator at the time of his death (which governs the devolution of his movables). In particular, such mixed cases give rise to the heir's

¹ Dicey, 5th ed., p. 603; *Studd v. Cook* (1883), 8 App. Cas. 577, 590-1; *Trotter v. Trotter* (1828), 4 Bli. (N.S.) 502, 505, 506.

² Cheshire, 3rd ed., pp. 705-6. ³ (1883), 8 App. Cas. 577.

right of recourse or to the problem of election. In these cases, it is, in the words of Grant, M.R., in *Brodie v. Barry*,¹

not easy to say how much is to be considered as depending on the law of real property, which must be taken from the country where the land lies; and how much upon the law of personal property which must be taken from the country of the domicile and to blend both together; so as to form a rule applicable to the mixed question which neither law separately furnishes sufficient materials to decide.

The heir's right of recourse² exists in the following circumstances. If a testator leaves land in a foreign country and personal estate in this country, his successor might be compelled, by the *lex situs* of the foreign land, to pay the debts of the testator. Is such an heir entitled to be recompensed out of the personal estate in this country? If the testator has expressly provided which part of the estate shall bear the burden, his directions have to be followed and no difficulty arises.³ If, however, the intention of the testator cannot be gathered from the will, the question whether the heir to land who has paid the testator's debts has a right of recourse against the personal estate appears to be governed by the *lex situs* of the land.⁴ But even if the *lex situs* of the land admits such a claim, it has further to be ascertained whether the *lex fori* of the administration of the estate also recognises the claim, since the payment of the testator's debts pertains properly to administration and not to distribution.⁵

A similar problem arises when the beneficiary⁶ is put to election. If a testator gives his property to a devisee, and by the same instrument directs that the devisee from his own property shall make a gift to a third person, the devisee has to elect whether he will comply with all directions of the will, the favourable as well as the onerous ones, or whether he will refuse to take under the will and keep his own property. Lord Eldon, in a classic passage in *Ker v. Wauchope*⁷ described this doctrine as follows—

If a testator gives his estate to A, and gives A's estate to B, Courts of Equity hold it to be against conscience that A should

¹ (1813), 2 Ves. & B. 127, 131.

² Dicey, 5th ed., Note 25, p. 974 and Williams, *On Executors*, 12th ed., Vol. 2, p. 1109.

³ *Re Smith*, [1913] 2 Ch. 216.

⁴ *Earl of Winchelsea v. Garrett* (1837), 2 Keen. 293. Before 1926, the personal estate of the deceased was primarily liable for the payment of his debts. Since 1926, personalty and realty contribute rateably to the payment of general debts of the deceased but the old rule still applies to the payment of legacies. (Administration of Estates Act, 1925, 1st Sched., Part II).

⁵ See the rule in *Re Kloebe* (1884), 28 Ch. D. 175, *ante* p. 224; and Dicey, 5th ed., p. 974.

⁶ Under a will or a settlement, because election may likewise arise under a settlement.

⁷ (1819), 1 Bli. 1, 21.

take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition in the will of the testator. The Courts will not permit him to take that which cannot be his, but by virtue of the disposition of the will; and at the same time to keep what by the same will is given, or intended to be given, to another person.

The doctrine of election (in Scottish law known as the doctrine of approbating or reprobating) has given rise to many conflictual disputes when the two competing gifts are governed by different laws. From the mass of embarrassing details, two cardinal points should be noticed.* First, the question whether a beneficiary is put to election or not depends on the law of the testator's domicile at the time of his death,¹ the *lex situs* of the immovables forming the subject matter of the devisee being irrelevant.² Secondly, the doctrine of election presupposes that a true choice is possible for the devisee. "Election means free choice."³ If the devisee cannot in any circumstances execute the direction of the testator, his free choice is excluded, the doctrine of election is not applicable, and the devisee can take the benefit under the will without being compelled to make the onerous gift to the third person out of his own property. A case where the free choice of election was excluded was *Brown v. Gregson*.⁴

The testator who died domiciled in Scotland had disinherited by his will some of his children and devised the residue of his estate in trust for his other children as beneficiaries.

Part of his estate was land situate in the Argentine. By the law of that country, no trusts are admitted and the Argentine land, therefore, devolved *ab intestato* to all of his children (including those disinherited).

The disinherited children claimed that the beneficiaries under the will should be put to election,⁵ and that, as they had in fact elected to take under the will, they were bound to surrender to the claimants the Argentine land which had fallen to them *ab intestato*.

The House of Lords held that no case of election had arisen and that the beneficiaries were, therefore, not obliged to give up their shares in

* For further reading: Cheshire, 3rd ed., 740; Dicey, 5th ed., p. 975.

¹ It is not definitely settled whether the law of domicile is applied *qua* the testator's personal law, or *qua* the law governing the construction of the will. If the former is the case, the law of domicile applies invariably; if the latter view is correct, the law of domicile is merely presumed to apply (see p. 236, *ante*). Cohen, J., in *In re Allen*, (1945) 114 L.J. Ch. 298, took the latter view; the doubts raised by J. H. C. Morris in 24 *Canadian Bar Review* 528 as to the correctness of this decision are well founded.

² *Brodie v. Barry* (1813), 2 Ves. & B. 127; *Trotter v. Trotter* (1828), 4 Bli. (N.S.) 502; *Baring v. Ashburton* (1886), 54 T. 463; *Dundas v. Dundas* (1830). 2 Dow & Cl. 349; *Balfour v. Scott* (1793), 6 Bro. P.C. 550.

³ *Per Chitty, J.*, in *In re Lord Chesham* (1886), 31 Ch. D. 466, 476.

⁴ [1920] A.C. 860.

⁵ The doctrine of election forms part of Scottish law and is, there, called the doctrine of approbating or reprobating.

the Argentine land. The reason for this decision was that, in view of the prohibitions of Argentine law, the beneficiaries were prevented from complying with the directions of the testator and thereby deprived of the free choice between two possibilities which is essential for the application of the doctrine of election.

III. ASSIGNMENT ON MARRIAGE

1. GENERAL OBSERVATIONS.

A. Introduction. In English law, the gradual emancipation of the married woman, as far as her property is concerned, has taken place in three stages. The old Common Law rule was that husband and wife were one person in law ; ¹ on marriage, all the property of the wife devolved automatically on the husband, who was entitled to treat it during coverture exactly as his own.² In the second stage, Equity mitigated the rigidity of the Common Law rule and admitted the creation of trusts for the separate use of the wife.³ The third stage arose under the Married Women's Property Acts ⁴ which recognised the married woman's legal right to separate property. By these enactments, the Common Law rule was completely reversed. To-day the married wife is in the same position as a *femme sole*, as far as the acquisition, enjoyment and transfer of property is concerned.⁵

Not all foreign legal systems have adopted such an enlightened attitude with respect to the proprietary relationship between husband and wife. Professor Kaden ⁶ has compared the different types of the marital *régime* which are still in existence in European countries. The most important of them can be classified as follows—

(1) Devolution of property on husband on marriage.	<i>Régime de l'unité des biens.</i>	Similar to the old Common Law rule. Still admitted as contractual <i>régime</i> in Switzerland.
(2) Community of goods.	<i>Régime de communauté.</i>	E.g. general community in Holland ; community of movables in France.

¹ Co. Litt. 112.

² Bracton, I, f. 32a. "Omnia quae uxoris sunt, sunt ipsius viri, ne habeat uxor potestatem sui, sed vir."

³ See 5 Holdsworth, 312.

⁴ Married Women's Property Act, 1882 ; Married Women's Property Act, 1893.

⁵ Law Reform (Married Women and Tortfeasors) Act, 1935.

⁶ Professor Erich-Hans Kaden on "*Eheliches Güterrecht*" in *Rechtsvergleichendes Handwörterbuch für das Zivil-und Handelsrecht*, Vol. I, pp. 704, 708.

(3) Husband is entitled to administer wife's property.	<i>Régime de l'union des biens.</i>	E.g. in Germany (unless excluded by marriage contract).
(4) The separation of goods.	<i>Régime de séparation des biens.</i>	E.g. in England.

Since in practice "the number of schemes of marital property law seems almost infinite,"¹ it is not surprising that the devolution of property on marriage frequently gives rise to conflictual disputes. They are mainly concerned with two questions: First, what marital *régime* governs the property of spouses who, prior to their marriage, lived under different personal laws? Secondly, does a change in the matrimonial domicile subsequent to the celebration of the marriage lead to a change in the original *régime* respecting their goods?

B. Marriage Contracts. Parties who live, prior to their marriage, under different personal laws frequently provide for their proprietary relationship after the marriage by means of a marriage contract² or marriage settlement which is usually concluded before the celebration of the marriage. If the parties have done so, their proprietary relationship is entirely governed by the law of their contract,³ and the whole problem is transferred from the law of general assignments to that of contracts and particular assignments. Here we have, in theory, to distinguish between the purely contractual effect of the marriage contract and its effect *in rem*, e.g. its operation as a particular assignment.

Regarding first the purely contractual effect of the marriage contract, the proper law of the contract governs marriage contracts in the same way as it governs all other kinds of contracts.⁴ The task is here to ascertain the intention of the parties. If the parties were careful to lay down expressly which law was to govern the marriage contract, this law applies to the regulation of their matrimonial *régime* in all respects.⁵ An example of such an express stipulation was at issue in *Montgomery v. Zarifi*,⁶ where the clause provided, in terms, that

¹ Pollock and Maitland, *History of English Law*, 2nd ed., Vol. II, p. 399.

² In this section we understand by the short though not quite correct expression "marriage contract" contracts concluded in consideration of an intended marriage and marriage settlements; see p. 130, *ante*.

³ *Montgomery v. Zarifi* (1919), 88, L.J.P.C. 20; *Anstruther v. Adair* (1834), 2 My. & K. 513; *Duncan v. Cannon* (1854), 18 Beav. 128 and the cases mentioned in fn. (3)-(5).

⁴ *Duke of Marlborough v. A.G.*, [1945] Ch. 78.

⁵ *Montgomery v. Zarifi* (1919), 88, L.J.P.C. 20. ⁶ (1919), 88, L.J.P.C. 20.

the rights of all persons claiming hereunder shall be regulated according to the law of England in the same manner as if the husband were now domiciled in England and as if the husband and wife were to remain henceforth during their respective lives domiciled in England.

The House of Lords gave full effect to this clause.

If the parties have omitted to lay down expressly the law applicable to their marital *régime*, the courts will examine the surrounding circumstances with a view to establishing the presumed intention of the parties.¹ The courts are, as has been explained earlier,² assisted here by a special presumption in favour of the law of the matrimonial domicile, i.e. the domicile of the husband at the date of the marriage,³ but they are ready to consider this presumption as displaced if the weight of the facts points to another legal system.⁴

Regarding, further, the effect *in rem* of the marriage contract, there exists, it is believed, no reason why the ordinary conflictual rules as to the transfer of immovables⁵ or of movables⁶ should not apply. However, disputes concerning the transfer of property in pursuance of a marriage contract arise almost invariably⁷ between husband and wife or their assignees; they concern, therefore, an *inter se* relationship of a personal character, and fall within the exception in favour of the proper law of the contract, which exception to the strict *lex situs* rule is recognised, as will be recalled, in the case of the transfer of both immovables⁸ and movables.⁹ For this reason, it would not be going too far to say that the proper law of the marriage contract governs all proprietary relations between the spouses, including the contractual incidents and the transfer of property in pursuance of the marriage contract.

To sum up, in the case of a marriage contract the answer to the two questions stated earlier¹⁰ is: The proper law of the marriage contract governs the proprietary relations between the parties after their marriage in all respects. The question whether a subsequent change of the husband's domicile entails a change in the marital *régime* cannot arise here, since the contractual obligation or the transfer of

¹ *Duke of Marlborough v. A.G.*, [1945] Ch. 78.

² See p. 130, *ante*.

³ *In re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573, 587; *Chamberlain v. Napier* (1880), 15 Ch. D. 614.

⁴ *In re Bankes*, [1902] 2 Ch. 333; *Van Grutten v. Digby* (1862), 31 Beav. 561; *Watts v. Shrimpton* (1855), 21 Beav. 97.

⁵ P. 159, *ante*.

⁶ P. 180, *ante*.

⁷ *Quaere* whether a transfer of goods in consequence of a marriage contract gives the spouse priority over the claims of a third person if the transfer satisfies the proper law of the marriage contract but not the *lex situs* of the goods. *Ex parte Sibeth* (1885), 14 Q.B.D. 417 did not decide this point, because both laws arrived at the same result.

⁸ P. 173, *ante*.

⁹ P. 191, *ante*.

¹⁰ P. 247, *ante*.

property by particular assignment is never affected by a subsequent change in the domicil of one of the parties to the contract or transfer.¹

2. GENERAL ASSIGNMENT ON MARRIAGE.

It follows that the only case, where we are entitled to speak of a general assignment on the occasion of a marriage, arises when the parties have omitted to conclude a marriage contract regulating their proprietary rights. To give an example of the two problems which are likely to arise here, if an English woman marries a man domiciled in Utopia, and Utopian law prescribes that, in the absence of an agreement to the contrary, the estate of the wife devolves on marriage to the husband, who enjoys the unrestricted right of ownership over it, the question is whether on marriage the wife loses the ownership in her goods. Further, if after their marriage the Utopian husband changes his domicil to Ruritania, where the law provides that the husband is merely entitled to the administration of the estate of the wife, it may be doubtful whether in consequence of this change of domicil the husband has thenceforth merely the right to administer but not to dispose of his wife's property.

A. The principle stated. The principle governing the devolution of property on marriage in the absence of a marriage contract has been stated by Lord Herschell in *Welch v. Tennent*.² In that case the matrimonial domicil was Scotland. Lord Herschell said ³—

There can be no doubt, as I have said, that the rights of the spouses as regards movable property must, in the circumstances of this case, be regulated by the law of Scotland, but it is equally clear that their rights in relation to heritable estate are governed by the law of the place where it was situate.

In short, the answer to the first question mentioned above is that the marital *régime* governing the movables of the spouses has to be ascertained by the law of the matrimonial domicil⁴ whilst that applicable to their immovables has to be found on the basis of the respective *leges situs* of the immovables. In our example above, the movables of the wife devolve by Utopian law upon her husband, but her immovable estate situate in England remains her separate property. These rules correspond closely to those governing the devolution of property on death.⁵

B. Effect of subsequent change of matrimonial domicil. We come now to the second problem raised above,⁶ namely, how far a subsequent

¹ *De Nicols v. Curlier*, [1900] A.C. 21, 33, 46.

² [1891] A.C. 639, 645.

³ On the definition of the matrimonial domicil, see p. 295, *post*.

⁴ See p. 226, *ante*.

⁵ See p. 247, *ante*.

change of the husband's domicile entails a change of the marital *régime* of the spouses, if they have not concluded a marriage contract. This question can obviously not arise with respect to immovables owned by one of the spouses, since those immovables continue to be governed by their respective *leges situs*.

With respect to the movable estate, however, the position is not free from doubt. The law has to be deduced from two cases, decided by the House of Lords, namely *Lashley v. Hog*¹ and *De Nicols v. Curlier*.² These cases are reconcilable, though not with ease; it is, however, doubtful whether they represent the law in its definite form.

As the law stands at present, the rule is that a subsequent change in the matrimonial domicile entails a change of the marital *régime* of the spouses regarding their movables, unless the wife has by the previous matrimonial law acquired a definite title to the movables; such definite proprietary right of the wife is not lost or impaired by a subsequent change of the matrimonial domicile. Lord Halsbury, L.C., stated this rule when explaining the distinction between *De Nicols v. Curlier*² and *Lashley v. Hog*.¹ The Lord Chancellor³ observed—

If the wife . . . acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile, as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if by the marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what is not his.

In consequence, the problem resolves itself into a question of definition of right. We have to ascertain the wife's position under the original marital *régime*. If the latter system has left the wife with a mere expectation which is realised on the death of the husband, e.g. a claim to a legal portion on the death of the husband, the subsequent change of the matrimonial domicile will affect her position.⁴ If, on the other hand, the wife has by the law of the original matrimonial domicile acquired a definite proprietary right, that right cannot be affected by a subsequent change in domicile; the wife is then in the same position as if she had acquired the proprietary right under an express marriage contract. This rule might be illustrated by *De Nicols v. Curlier*.²

¹ (1804), 4 Paton, 581.

² [1900] A.C. 21.

³ At p. 27.

⁴ Compare here: *In re Groos*, [1915] 1 Ch. 572, ante, p. 234.

In this case, Mr. and Mrs. De Nicols, who were French subjects domiciled in France, married there in 1854 without a marriage contract. Subsequently, they came to London with limited means, and acquired a domicile here. The husband amassed a large fortune and became proprietor of the Café Royal, Regent Street. He died in 1897, leaving by will his property in trust for his wife during her life and after her death to his children.

The issue was whether the widow had an unrestricted claim to that share in the movable estate left by the husband which had vested in her by French law, or whether she had lost the share in consequence of the subsequent acquisition of a domicile in England.

The spouses had not concluded a marriage agreement. According to the French Code Civil, they were placed, by the sole fact of their marriage, in the same position as if they had adopted the *régime de communauté* by written ante-nuptial agreement.

The House of Lords decided that the widow was entitled to her share in the community of movables. The decision rests on two grounds. Lord Halsbury, L.C., and Lord Morris held that the French marriage conferred on the wife "an actual binding partnership proprietary" right, which "no act of either of the parties contracting marriage can affect or qualify." Lords Macnaghten, Shand and Brampton reasoned that French law implied a marriage contract affecting the proprietary relationship of the spouses, and that the position was, therefore, as though the parties had concluded an express marriage settlement.

C. Criticism of the principle. The present rule that, apart from exceptions, a subsequent change in the matrimonial domicile leads to a change in the original proprietary relationship of the spouses might entail great inconvenience for them. If, for instance, an English married couple, each of them possessed of substantial movable estate, acquired a domicile abroad, they might find themselves entangled in an embarrassing marital *régime* regarding their movables unless they had concluded a marriage contract. The new proprietary *régime* might be entirely contrary to their intention, and they might desire to continue the *régime* of the separation of property which prevails under English law. The probable reason why this situation has not led to a further development in the law or to an intervention of the legislature similar to Lord Kingsdown's Act is that the practice of concluding marriage settlements is so widespread.

IV. ASSIGNMENT ON BANKRUPTCY

English bankruptcy law is based entirely on statutes,¹ the Common Law not having developed any rules relating to bankruptcy. The law in force at present is contained in the *Bankruptcy Acts*, 1914 and

¹ The first English statute was 34 Hen. VIII c. 4 (1542); see 2 Blackstone 444.

1926, and these Acts have to be considered when the conflictual rules relating to the assignment of property on bankruptcy are examined.

1. JURISDICTION.

"Bankruptcy is a proceeding by which the Court takes possession of the property of a debtor by an officer appointed for the purpose, and such property is realised and, subject to certain priorities, distributed rateably amongst the persons to whom the debtor owes money or has incurred liabilities."¹ It is important to notice the rôle played by the Court in bankruptcy proceedings. The Court adjudicates the debtor bankrupt and thereby causes his property to vest in a public officer, it supervises the collection of the bankrupt's assets and their distribution to the creditors, and discharges the bankrupt from his liabilities. We have, therefore, first of all to ascertain the jurisdiction of the English and foreign courts in matters of bankruptcy.

A. Jurisdiction of the English Courts. The Bankruptcy Act, 1914, Sects. 1 to 12, contains detailed provisions on the jurisdiction of the English courts in bankruptcy matters. The jurisdiction of the English courts depends on two conditions: first, that an act of bankruptcy has been committed by the debtor, and secondly, that the requirements for a bankruptcy petition are satisfied. If both conditions are satisfied the court may make a receiving order. On the making of such an order the official receiver takes control of the debtor's property and the debtor and his property are protected against suits by the creditors.

Regarding the first of the two requirements for the exercise of bankruptcy jurisdiction by the English courts, the acts of the debtor which might constitute an act of bankruptcy are not confined to measures taken by him in England; many of the acts of bankruptcy can be committed "elsewhere."² If, for instance, an English debtor goes to Paris and there assigns his property to a trustee for the benefit of his creditors, or makes a fraudulent gift there, this would constitute an act of bankruptcy within the meaning of Sect. 1 (1) (a) and (b) of the Act. Similarly, if an English debtor informs his foreign creditors that he is unable to meet his liabilities, whether they are enforceable in England or abroad,³ this would constitute an act of bankruptcy.

The second requirement for the exercise of bankruptcy jurisdiction by the English courts is that a bankruptcy petition can properly be

¹ *Halsbury's Laws of England*, 2nd ed., Vol. II, at p. 4.

² Bankruptcy Act, 1914, s. 1 (1), (a), (b), (c), (d), (g), (h).

³ *Ibid.*, s. 1 (1) (h); *In re A Debtor*, [1929] 1 Ch. 362.

presented to the court. Such a petition can be submitted either by the debtor or by a creditor. The expression "debtor" is defined in Sect. 1 (2) of the Act; it includes persons who, though neither ordinarily domiciled or resident in England, carry on business here personally by means of an agent or manager or as members of an English firm or partnership. Every person, who is a debtor within the meaning of the Act, may present a bankruptcy petition, and no further conditions have to be satisfied by him. The cases in which a creditor can present a bankruptcy petition are more restricted; a creditor is only entitled to do so if he can bring his claim within the provisions of Sect. 4 of the Act. One of these provisions is the well known one that the creditor's claim must amount to fifty pounds;¹ another provision is

that the debtor is domiciled in England or within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in England, or (except in the case of a person domiciled in Scotland or Ireland or a firm or partnership having its principal place of business in Scotland or Ireland) has carried on business in England, personally or by means of an agent or manager, or (except as aforesaid) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners, or an agent or manager.²

By this provision the creditor's right of presenting a bankruptcy petition is restricted; he can make bankrupt only such debtors who have more than a superficial connection with this country; e.g. the creditor could not ordinarily present a petition against a debtor who is ordinarily resident and carrying on business abroad and is here only on a fleeting visit.

B. Jurisdiction of the foreign courts. We come now to the jurisdiction of foreign courts in bankruptcy proceedings. The conditions on which the foreign courts are entitled to exercise such jurisdiction are naturally laid down by their municipal laws; they pertain entirely to the legal system administered by those courts and are outside the province of the English conflict of laws. It is, however, a different question whether, when a foreign court has assumed bankruptcy jurisdiction in accordance with the rules of its own law, such jurisdiction will be recognised by the English courts. This question falls clearly within the scope of our subject. It is important to ascertain whether, in the eyes of the English conflict of laws, the foreign court was competent to exercise bankruptcy proceedings, for only if a

¹ S. 4 (1) (a).

² S. 4 (1) (d).

competent foreign court has adjudicated the debtor bankrupt, can any effect be given within the English jurisdiction to the foreign bankruptcy and, then, in particular, the foreign trustee can raise a claim to the assets of the debtor situate in this country. It was previously thought that the competency of the foreign court depended on the domicile of the debtor ¹ and that no other foreign court than that of the domicile was entitled to adjudicate the debtor bankrupt; this view is supported by Story.² The main objection to this view is that it is "out of harmony with the practice of the English Bankruptcy Court whose jurisdiction . . . was not confined to persons domiciled in England."³ To-day, Story's view is generally abandoned.

Moreover, it has been decided that the foreign court is competent if the debtor has taken part in the foreign bankruptcy proceedings though he is not domiciled within its territory. If the debtor has submitted to the foreign bankruptcy, e.g. by presenting the petition himself ⁴ or by asking the foreign court for a discharge in a creditor's proceedings,⁵ the foreign court is considered as competent although the debtor was domiciled outside its jurisdiction. It is, further, believed that the English courts will not refuse recognition of a bankruptcy ordered by a foreign court if the debtor carried on business within the foreign jurisdiction and was possessed of movable or immovable property there although he was not domiciled there.

C. Concurrent bankruptcies. If the commercial activities of a debtor extend over several countries, bankruptcy proceedings may be instituted in courts of different countries at the same time. This is hardly avoidable since each of these courts assumes its jurisdiction by virtue of territorial sovereignty. It is, therefore, not surprising to notice that the Bankruptcy Act, 1914, does not impose any restriction on the bankruptcy jurisdiction for the reason that proceedings are already pending in another court.

It is a different question whether English courts, though entitled to assume jurisdiction, will exercise their discretion to stay their English proceedings in view of contemporaneous proceedings in a foreign court. This, indeed, is the only question arguable with respect to the jurisdiction of the English courts in cases of concurrent bankruptcies.

¹ *In re Bliethman* (1866), L.R. 2 Eq. 23, 26; *In re Hayward, Hayward v. Hayward*, [1897] 1 Ch. 905.

² Dicey, 4th ed., Rule 124, Comment, p. 480.

³ Story, s. 404.

⁴ *Re Davidson's Settlement Trusts* (1873), L.R. 15 Eq. 383; *In re Lawson's Trusts*, [1896] 1 Ch. 175.

⁵ *In re Anderson*, [1911] 1 K.B. 896, 902.

Here, as Fry, L.J., explained in *In re Artola Hermanos*¹ there are three possibilities. First, it has been suggested "that every other *forum* shall yield to the *forum* of the domicil."² The supporters of this doctrine of the unity of bankruptcy,³ among them Savigny,⁴ consider the domicil of the debtor as the *forum concursus*; they regard the trustee appointed by the courts of this *forum* as the principal trustee to whom all others are ancillary; according to the doctrine of the unity of bankruptcy, all creditors have to submit to the distribution of the debtor's property and all courts have to stay their proceedings in favour of those of the debtor's domicil. The second possibility is that the courts of the country where the debtor was first adjudicated bankrupt should be the principal courts of bankruptcy and all other courts should abstain from exercising jurisdiction. The third view is that the several courts should administer their bankruptcy proceedings separately; in this case it is left to the trustees in the single bankruptcies either to come to an understanding or to marshal as many assets of the debtor as they possibly can, if necessary by way of legal proceedings in the other jurisdictions, whilst the debtors have to prove their claims in the several bankruptcies as long as they have not received full satisfaction.

Of these three possibilities the second one can be ruled out at the beginning; it is, in the words of Fry, L.J.,⁴ "entirely unreasonable" to assume that priority of time should determine the jurisdiction of the competing courts. Unity of bankruptcy may be desirable, but it should be remembered that Lord Westbury's⁵ view on the domicil of the *de cuius* as the *forum concursus* in the cognate case of the administration of assets of a deceased person has not been generally accepted. The theoretical objection to the doctrine of unity is that it does not take sufficiently into account the rôle of the court in bankruptcy proceedings. Since bankruptcy is always in the nature of State interference in a person's affairs, the courts adjudicating a debtor bankrupt can hardly claim an extra-territorial jurisdiction though their order may, in the province of substantive law, affect property of the debtor in other countries. It follows that the only theory that is in consonance with principle is the third possibility, although it leads in some respects to inconvenience and multiplicity of court proceedings.

This third possibility, sometimes called the theory of separate

¹ (1890), 24 Q.B.D. 640, 648.

² See Westlake, 7th ed., p. 169.

³ *System*, s. 374 (trans. Guthrie) 213.

⁴ *In re Artola Hermanos* (1890), 24 Q.B.D. 640, 649; see also *per* Phillimore, J., in *In re Anderson*, [1911] 1 K.B. 896, 903.

⁵ *In Enohin v. Wylie* (1862), 10 H.L.Cas. 1, 13; see p. 220, *ante*.

bankruptcies, has been adopted by the English courts.¹ In consequence, if any property of the debtor is within the English jurisdiction, the English courts will not order a stay of the English bankruptcy proceedings merely on the ground that proceedings are pending in a foreign court. The English courts of bankruptcy are, however, courts of equity and have full discretion to order a stay of the English proceedings whenever it seems convenient to them, e.g. if no assets are situate in England, and the adjudication would be "altogether a vain thing,"² the English courts would, by virtue of their discretion, refuse an adjudication of the debtor and leave the whole proceedings to the foreign courts. It is, however, important to note that the principle of separate contemporaneous bankruptcies has been adopted only with respect to jurisdiction, largely for the practical purpose of enlarging the possibilities of collecting the assets of the debtor. The principle does not extend to the administration and distribution of the assets of a bankrupt. Phillimore, J., said in *In re Anderson* ³—

And, at any rate, for the purpose of *colligenda bona*, it may be quite proper to have two bankruptcies running, one in this country and another in some foreign country. In those cases the Court by upholding the title of the trustee in the English bankruptcy does not mean, as Lord Coleridge clearly pointed out,⁴ to decide the ultimate right to the assets. It merely gives a title *ad colligenda bona*.

2. GENERAL ASSIGNMENT ON BANKRUPTCY.*

After the debtor has been adjudicated bankrupt, his assets are collected by the trustee and then distributed among his creditors. We are here concerned with the first of these activities, and shall consider the second aspect later when dealing with the proof of debts by creditors.

As regards the collection of the bankrupt's assets, "the general principle which underlies every bankruptcy system is that after bankruptcy the bankrupt is no longer really the owner of his own property."⁵ Upon his adjudication, his property vests in the trustee⁶

* For further reading: K. H. Nadelmann, "Solomons v. Ross and International Bankruptcy Law," (1946) 9 *Mod. L.R.*, 154; K. H. Nadelmann, "The National Bankruptcy Act and the Conflict of Laws," (1946) 59 *Har. L.R.*, 1025.

¹ *In re Ariola Hermanos* (1890), 24 Q.B.D. 640; *In re a Debtor*, [1922] 2 Ch. 470; *In re a Debtor*, [1929], 1 Ch. 362, 370; *Ex parte McCulloch* (1880), 14 Ch. D. 716; *In re Anderson* [1911], 1 K.B. 896, 903.

² *Ex parte Robinson* (1883), 22 Ch. D. 816, 818.

³ [1911] 1 K.B. 896, 903.

⁴ *In re Ariola Hermanos* (1890), 24 Q.B.D. 640, 646.

⁵ *Per Lord Dunedin in Galbraith v. Grimshaw*, [1910] A.C. 508, 512.

⁶ Bankruptcy Act, 1914, s. 53.

as the representative of the creditors. This is a typical example of a general assignment; it is comparable in character to the devolution of the assets of a deceased person on his death.

The question is, however, which assets devolve upon the trustee on the adjudication of the bankrupt. Is the trustee entitled to assets situate outside the jurisdiction of the state from which he derives his authority? And should a distinction be drawn between the movable and immovable property of the debtor? These and similar questions we have now to consider.

With regard to the extra-territorial effect of a bankruptcy, there exists a difference of opinion between the English and American systems of the conflict of laws. From the strictly logical point of view, it would appear that the trustee like the administrator in case of the assignment on death cannot claim assets situate outside the state from which he derives his authority. This, indeed, is the view of American law. It has found its expression in the American *Restatement* in the following rule ¹—

An assignment for the benefit of creditors of all the movable property of a debtor made in accordance with an insolvency or bankruptcy act of a state, whether made by the debtor himself or by operation of law, will not be effective as to chattels in another state.

In English law, on the other hand, since early times ² emphasis has been laid on the effect of the adjudication as a general assignment. The trustee was, at least as far as the debtor's movables were concerned, considered as his universal successor; to him the principle "*mobilia sequuntur personam*" was applied,² and he was, therefore, entitled to claim the debtor's movables wherever they were situate.³ Thus Lord Loughborough observed in *Sill v. Worswick* ²—

Personal property, then, being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property in assignees. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees.

This dictum represents the Common Law rule on the extra-territorial effect of an adjudication in bankruptcy.

¹ S. 264; see also *Security Trust Co. v. Dodd Mead & Co.* (1899), 173 U.S. 624 and the observations of Lorenzen, 4th ed., 1937.

² *Sill v. Worswick* (1791), 1 H. Bl. 665, 690.

³ *Solomons v. Ross* (1764), 1 H. Bl. 131; *Jollet v. Deponthieu* (1769), 1 H. Bl. 131 (note).

To-day, the title of a trustee in an English bankruptcy is determined exclusively by the English Bankruptcy Acts, which specify the kinds of property which devolve upon the trustee and whether the trustee can claim property situate outside the English jurisdiction. The old rule which Lord Loughborough pronounced still applies, however, to the reverse case of the effect of foreign bankruptcies in England which are not covered by the Bankruptcy Acts.

A. The title of the English trustee to the assets of the debtor.

According to the Bankruptcy Act, 1914,¹ all movable and immovable property of the debtor in an English bankruptcy is vested in the trustee, whether the property is situate within or without the English jurisdiction. It is remarkable that the title of the English trustee extends not only to the foreign movable property of the debtor² but also to foreign land. This is an express statutory exception to the generally recognised rule that the title to land is governed by its *lex situs*—an exception presumably founded on a desire to make available for distribution among the creditors as much of the debtor's property as possible.

Since the Bankruptcy Act, 1914, is intended by the Imperial Parliament to bind all British courts, the attachment of immovables under an English adjudication in bankruptcy is effective in any part of the British Empire and the courts in parts of the Empire other than England will acknowledge the title of the English trustee to immovables situate in their jurisdiction.³ Should, however, the laws in force in the relevant part of the Empire require additional formalities for the transfer of immovables, e.g. the registration or enrolment of the conveyance, then the trustee has to comply with the local form and is entitled to ask for the registration and enrolment of his title.⁴

The position with regard to immovables situate in territories under the dominion of a foreign sovereign is more difficult. It can hardly be disputed that the English Bankruptcy Act expressly intends to vest the title even to those immovables in the English trustee. This is at variance with the general principle that enactments of a sovereign should not have extra-territorial effect. How far a foreign court would recognise this apparent excess of jurisdiction on the part of the

¹ S. 167.

² *Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161, 175.

³ *Callender, Sykes & Co. v. Colonial Secretary of Lagos and Davies*, [1891] A.C. 460, 467. (This case actually dealt with an earlier Bankruptcy Act). The statement in the context is subject to the power conferred by the Statute of Westminster, 1931, on some of the Dominions to repeal Imperial Statutes. With respect to the Bankruptcy Act, this power has so far (it is believed) not been exercised.

⁴ S. 53 (4).

English legislature is a matter of the foreign conflict of laws concerned and beyond our subject. The provision in question, however, has an actual consequence in the province of the English conflict of laws. If, for instance, a foreign creditor has seized foreign immovable property of the debtor and attempts to claim in an English bankruptcy the balance of his claim for which he has not yet received satisfaction, the English courts, before admitting his claim, will ask him to convey the foreign immovables to the English trustee for the benefit of all creditors.

B. The title of a foreign trustee to the assets of the debtor. Logic demands that the title of a foreign trustee to the debtor's assets situate in England should correspond to the title claimed by an English trustee with respect to property of the debtor situate abroad. The English conflict of laws concedes this equality only to the trustee in certain Imperial bankruptcies but not to foreign trustees in general. The English trustee is, therefore, generally in a privileged position, as compared with his foreign counterpart.

A trustee in an Irish or Scottish or in a bankruptcy in India or Pakistan can, by virtue of Imperial¹ statutes, claim immovable and movable assets of the debtor situate in England.

Other foreign trustees appointed by a competent foreign² court in bankruptcy can claim the movable property situate in England of the debtor³ (unless it has already previously devolved upon an English trustee) but they are not entitled to claim English immovables. Here the privileged position of the English trustee becomes evident: the English trustee can claim the debtor's immovables and movables situate abroad, the foreign trustee only the debtor's movables situate in England, but not his English immovables. The explanation of this discrepancy is that the powers of the English trustee are derived from an Act of Parliament, whilst the foreign trustee bases his claims on the Common Law as stated by Lord Loughborough in *Sill v. Worswick*.⁴ However, in appropriate cases, the English courts will exercise their discretion as courts of equity and order that the English immovables be sold and the proceeds handed over to the foreign trustee or they

¹ For Ireland: *Irish Bankrupt and Insolvent Act, 1857*, ss. 267, 268. Apparently this Act still applies to Éire. For Scotland: *Bankruptcy (Scotland) Act, 1913*, s. 97. For India and Pakistan: *Indian Insolvency Act, 1848*, s. 7; see D. F. Mulla, *Law of Insolvency in British India*, pp. 58-60.

² See p. 253, *ante*.

³ *Solomons v. Ross* (1764), 1 H. Bl. 131 (n.); *Jollet v. Deponthieu* (1769), 1 H. Bl. 132 (n.); *In re Anderson*, [1911] 1 K.B. 896, 902; *In re Craig* (1916), 86 L.J. Ch. 63.

⁴ (1791), 1 H. Bl. 665.

will even appoint the foreign trustee as receiver with authority to sell the immovables and to distribute the proceeds among the creditors. In view of the provisions of Sect. 122 of the Bankruptcy Act, 1914, the English courts will exercise this discretion more readily in favour of a trustee appointed by an Imperial bankruptcy court (other than an Irish, Scottish, Indian and Pakistan court) than in the case of a trustee in other foreign insolvency proceedings.

In addition to the case of immovables, there is another contingency where the power of the foreign trustee is more restricted than that of his English colleague.

According to English law, adjudication in bankruptcy relates back to the time of the first act of bankruptcy committed by the debtor¹ and, in consequence, the English trustee can claim, in principle, all property, whatever its nature and wherever situate, that has been transferred by the bankrupt in the interval between the first act of bankruptcy and his adjudication. If, however, the foreign law from which a foreign trustee derives his authority recognises a rule corresponding to the English doctrine of relation back, the foreign trustee cannot invoke this doctrine in his favour; he stands exactly in the position of an assignee of the debtor and can claim only those movables which the debtor himself was entitled to assign at the time of the adjudication. Thus in *Galbraith v. Grimshaw*²

the debtors had been made bankrupt in Scotland, where the doctrine of relation back is recognised.

In the interval between the first act of bankruptcy and the adjudication, an English judgment creditor³ had attached and garnisheed a claim of the debtors against an English firm.

The Scottish trustee in bankruptcy claimed the money owed by the English firm, by virtue of the Scottish doctrine of relation back.

The House of Lords decided that the Scottish trustee was not entitled to the money. Lord Loreburn, L.C., said: "A foreign law making the title of the trustee relate back to transactions which the debtor himself could not have disturbed has no operation in England, while the English law as to relation back applies only to cases of English bankruptcy, and therefore the trustee may find himself (as in this case) falling between two stools."

C. Conflicting claims of the English and foreign trustee in case of concurrent bankruptcies. It should not be assumed that in the case of concurrent bankruptcies a conflict between the title of the several trustees to the property of the debtor must necessarily ensue.

¹ Bankruptcy Act, 1914, s. 37.

² [1910] A.C. 508.

³ It was actually a Scottish judgment creditor whose judgment had been extended to England and who was, therefore, in the position of an English judgment creditor.

⁴ At p. 510.

No conflict between the title of the English and the foreign trustee exists in the case of English immovables and assets recoverable under the English doctrine of relation back. Assets falling within these two categories can, as we have seen, be collected only by the English trustee and are beyond the reach of the foreign trustee. Indeed, it is mainly the consideration that under English law the English trustee can collect more property than his foreign colleague which induces the English courts not to order a stay of the English bankruptcy proceedings in the case of a contemporaneous bankruptcy pending abroad.¹

With respect to other assets of the bankrupt, and in particular to his movable property, a conflict of title of the several trustees might unfortunately² arise. Here the title of the trustee who was first appointed by a competent court of bankruptcy must prevail. Upon him devolve, by way of general assignment, all movables of the debtor which he has at the time of his adjudication or which come to him subsequently as after-acquired property.³ Trustees appointed subsequently can take no more than the debtor owns at the time of their appointment,⁴ and if, at that time, the debtor is already disseized of his movables in consequence of the assignment to the first appointed trustee, he cannot, in principle, assign them on his subsequent adjudication to the subsequent trustees. It is, however, desirable that here the several trustees should co-operate and come to an agreement among themselves. The English court will sanction a "common sense business arrangement" among them which is "manifestly for the benefit of all parties interested."⁵

3. DEBTS PROVABLE IN BANKRUPTCY.

After the trustee has collected the assets of the bankrupt, he has to distribute them among the creditors of the bankrupt. The distribution is effected according to the provisions of the *lex fori* of the Court which has authorised the trustee to administer the estate. Thus, in an English bankruptcy, questions pertaining to the admissibility of creditors to proof,⁶ the mode and manner of proving debts, the priority

¹ *In re Artola Hermanos* (1890), 24 Q.B.D. 640, 648. *Ex parte McCulloch* (1880), 14 Ch. D. 716; *In re Anderson*, [1911] 1 K.B. 896, 903.

² On the desirability of avoiding concurrent bankruptcies, see K. H. Nadelmann, *op. cit.*, (1946) 9 *Mod. L.R.* 154, 166.

³ *In re Temple*; *ex parte Official Receiver v. Official Assignee of Bombay*, [1947] 1 Ch. 345.

⁴ Except the English trustee, who can, as we have seen, rely on the doctrine of relation back.

⁵ *Per Bigham, J.*, in *In re P. Macfadyen & Co.*, [1908] 1 K.B. 675, 679.

⁶ *Ex parte Melbourne* (1870), L.R. 6 Ch. 64, 69.

of creditors¹ if the assets of the debtor are insufficient to cover all claims of the creditors, have all to be decided on the basis of English law. It is immaterial that these debts might have been contracted under a foreign law and that the creditors under such law might be entitled to priority over other creditors; "we take no notice of the origin of the debts of other creditors; we take upon ourselves the right of regulating . . . the application of the assets."²

Foreign creditors are admitted to proof in an English bankruptcy in the same manner as English creditors; no restriction exists with respect to their claim, and, in particular, it is irrelevant that the country where they are domiciled, or of which they are nationals, has not conceded similar treatment to English creditors. The universal admission of foreign creditors to an English bankruptcy is a corollary to the unrestricted claim of the English trustee to all movable or immovable property of the debtor wherever situate.

Furthermore, foreign creditors—and the same applies naturally to English creditors—are at liberty to prove the balance of their claim in an English bankruptcy, after they have received partial payment in a contemporaneous foreign bankruptcy. In this case, however, the foreign—or English—creditor is obliged to bring into the English bankruptcy the dividend which he has received abroad.³ This rule was formulated by Lord Cairns, L.J., in *Banco de Portugal v. Waddell*.³

The terms are perfectly clear that a person who after having proved under a foreign bankruptcy, claims to prove in a bankruptcy of the same debtors in England, he may do so; but he must do so upon the terms of bringing in, for the purpose of dividend, the sum which he has received abroad. As was said by Lord Eldon,⁴ "It has been decided that a person cannot come in under an English commission without bringing into the common fund what he has received abroad"; and Lord Eldon goes on to point out, what is obviously the case, that a creditor, because he happened personally to be in England, would not be obliged to bring this sum into the common fund—he might keep it if he liked but if he did not ignore it, if he sought to take advantage of it, if he sought to have some benefit from it, then, on the principle that he who asks for equity must do equity, he must bring into the common fund that which he has already received in respect of the obligations of the same debtors.

¹ *Thurnburn v. Steward* (1871), L.R. 3 P.C. 478, 513.

² The same applies if the creditor, after having received partial satisfaction abroad, either in execution of a foreign judgment or by other means, proves for the balance in the English bankruptcy.

³ (1880), 5 App. Cas. 161, 167; *Selkirk v. Davies* (1814), 2 Dow 230; *Ex parte Wilson* (1872), 7 Ch. App. 490.

⁴ In *Selkirk v. Davies* (1814), 2 Dow 230.

So far we have only explained that a creditor, who, after having received partial satisfaction abroad, actively takes part in the English bankruptcy, is obliged to bring into hotchpot what he has retrieved abroad. We have now to consider the further question whether a creditor who has received some satisfaction abroad can be compelled by the English trustee to hand over the proceeds thereof although he abstains from proving the balance of his debt in the English bankruptcy and takes, therefore, no active part in those proceedings. The views held by the textbook writers on this point differ widely. It appears that the difference of opinion, which we need not discuss in detail, is partly due to the interpretation put by Lord Cairns in the case of *Banco de Portugal v. Waddell*¹ on a *dictum* of Lord Eldon. Lord Cairns understood Lord Eldon as saying that a creditor would not be obliged to hand over his foreign proceeds to the English trustee merely for the reason that the creditor happened to be personally in England. Professor Cheshire expresses well founded doubts whether this interpretation of Lord Eldon's words is correct. According to Professor Cheshire's construction, "that learned judge admitted that the creditor could not be compelled to prove in the English bankruptcy, but he went on to observe that whether the trustee could, 'by law in another form,' get the property out of the creditor's hands was a different question."² Lord Eldon's *dictum*³ is, therefore, it is believed, no obstacle to an attempt to find a simple solution to our problem on the basis of the Bankruptcy Acts.

The present Act provides that all property of the debtor, wherever situate and whether of movable or immovable character, devolves upon the trustee at a certain moment.⁴ If this enactment has any meaning at all—and there is no reason for denying that it is fully operative within the jurisdiction of the English legislature it provides a complete solution to the problem of the abstaining creditor. All that has to be ascertained is whether the creditor attached the property of the debtor abroad before or after the general assignment to the English trustee became operative. If the attachment preceded the general assignment, the title of the creditor prevails, whereas, if the attachment was subsequent to the general assignment to the trustee, an action by the trustee for conversion or account against the abstaining creditor will succeed. That priority in time is the decisive test, can

¹ (1880), 5 App. Cas. 161, 167; *Selkraig v. Davies* (1814), 2 Dow 230; *Ex parte Wilson* (1872), 7 Ch. App. 490.

² Cheshire, 3rd ed., p. 642.

³ The same applies to Lord Loughborough's observations in *Sill v. Worwick* (1791), 1 H. Bl. 665, 693; the present solution has to be found exclusively on the basis of the Bankruptcy Act.

⁴ S. 167; see p. 258, *ante*.

also be deduced from the following general observations of Lord Kenyon, C.J., in *Hunter v. Potts*¹—

The general question here is, whether the assignment which was executed by the commissioners of the bankrupt was sufficient to vest the bankrupt's property in the plantations abroad in the assignees under the commission?—because, if it did so vest at the time of the assignment, it is immaterial to consider, in this case, how far the relation under the bankrupt laws should take effect in Rhode Island, since the assignment was executed anterior to the time when the attachment-suit was there commenced.

It is believed that priority of time governs the issue, whether the creditor received the foreign property of the debtor in the course of legal process in the foreign courts or by way of a voluntary transfer from the debtor, whether the creditor is a British subject or not,² whether the claim of the creditor originated in a British or foreign contract,³ or whether the creditor was subject to the British bankruptcy jurisdiction.

In particular, it appears to be merely accidental that the decisions concerning this subject matter⁴ relate only to creditors who were British subjects. No reason exists why alien creditors should not equally be subject to the relevant provisions of the Bankruptcy Act. The only requirement which the trustee has to satisfy, if he intends to compel an abstaining creditor to bring into hotchpot foreign proceeds received after the general assignment became effective, is that he must be able to serve a writ on the creditor either by way of ordinary process or by way of substituted service (O.II.).

4. DISCHARGE IN BANKRUPTCY.

Lastly, we have to consider the effect of a discharge of the bankrupt by the competent bankruptcy court.

A discharge in bankruptcy produces two effects which are cumulative and not alternative, viz. a territorial and an extra-territorial effect; each is based on entirely different theoretical foundations.

A. The territorial effect of an order of discharge. "Just as it requires an order of adjudication to make a man bankrupt, so it requires an order of the Court, an order of discharge, to restore him to his original status."⁵ Since the termination of the public management of the debtor's affairs is pronounced by the court, it follows that

¹ (1791), 4 T.R. 182, 192.

² Piggott, *Foreign Judgments*, 2nd ed., 332.

³ Westlake, 7th ed., 142-3.

⁴ *Sill v. Worswick* (1791), 1 H. Bl. 665; *Philipps v. Hunter* (1791), 4 T.R. 182; *Hunter v. Potts* (1791), 4 T.R. 182.

⁵ Ringwood, *Principles of Bankruptcy*, 18th ed., 1947, p. 201.

the effect and nature of the discharge is governed by the *lex fori* of the court ordering the discharge; in particular, the *lex fori* determines whether the discharge operates as an extinction and complete discharge of the original debt or merely as a bar to the remedy. If, by the *lex fori* of the court pronouncing the discharge, the discharge is merely of procedural character and only prevents the creditors from enforcing their still unsatisfied claims against the discharged bankrupt, no question of any extra-territorial effect of the discharge can arise. If, on the other hand, the discharge operates as a complete discharge and satisfaction of the original obligation, it may produce, as we shall see presently, an extra-territorial effect. A discharge in an English bankruptcy falls under the second category; it extinguishes the obligation and is, therefore, capable of producing an extra-territorial effect.

A further deduction from the fact that the debtor is discharged by authority of the court, as representative of the sovereign, is that the discharge is operative throughout the whole territory over which the sovereign has jurisdiction. "The operation of a discharge depends upon the territorial limits assignable to the authority of the sovereign by whose command the discharge is given."¹ A discharge in an English bankruptcy has, therefore, effect in every other part of the British Empire, because it is pronounced under the authority of an Imperial statute, viz. the Bankruptcy Act.² Similarly, a discharge ordered in any other part of the Empire under an Imperial statute is recognised by the English courts as an absolute satisfaction of the creditor's claim.³

B. The extra-territorial effect of an order of discharge. If the theory that a discharge in bankruptcy is essentially an act of a sovereign is carried to its logical conclusion, the result would be that the discharge in bankruptcy does not operate outside the territory of the sovereign ordering the discharge. This doctrine is, indeed, adopted by the American conflict of laws;⁴ to the American jurist this is merely an application of the broad rule that proceedings in bankruptcy cannot produce any extra-territorial effect.⁵ English law, on the

¹ Dicey, 5th ed., p. 948.

² Unless the Act has been repealed by any of the self-governing Dominions under s. 2 of the Statute of Westminster, 1931. This has not been done so far. See also Bovill, C.J., in *Ellis v. McHenry* (1871), L.R. 6 C.P. 228, 235.

³ For a Scottish discharge: *Sidaway v. Hay* (1824), 3 B. & C. 12; for an Irish discharge: *Ferguson v. Spencer* (1840), 1 M. & G. 987; proceedings in Newfoundland: *Philpotts v. Reed* (1819), 1 B. & B. 294.

⁴ See *American Restatement*, para 375, comment, and *Barnett v. Kinnery* (1893), 147 U.S. 476.

⁵ See p. 257, *ante*.

other hand, recognises, in principle, an extra-territorial effect of the adjudication in bankruptcy and no theoretical objection is raised to the argument that the discharge in bankruptcy might produce an extra-territorial effect.

We have seen that the municipal laws of some countries, and in particular the law of England, provide that a discharge in bankruptcy shall operate as a complete discharge of the original obligation extinguishing (like performance or supervening illegality in the realm of contract) the obligation as such. In these cases, the debtor can maintain in every jurisdiction, and not only in the courts of the state which has given him his discharge, that his debt has been extinguished. If, for instance, the original obligation of the debtor was founded on a tort committed by him, and the debtor has obtained his discharge from the courts of the place where the tort was committed, the tort is no longer actionable under the *lex loci commissi* and, according to the general rules relating to tortious obligations explained earlier,¹ no action would lie on such a tort in an English court. In other words, in this case the discharge in bankruptcy has extra-territorial effect, not in consequence of any special conflictual rule relating to bankruptcy, but by virtue of the general principles of the conflict of laws. A similar position arises in the case of a discharge in bankruptcy extinguishing an obligation founded on contract. It may be said, in general, that the extra-territorial effect of a discharge in bankruptcy is determined by the conflictual rules governing the discharge of this obligation in ordinary circumstances, and not by any special rules derived from the theoretical character of the bankruptcy proceedings.

In particular, the discharge of a contract is an incident pertaining to the performance of the contract. *Prima facie*, the proper law of the contract with respect to its performance is the *lex loci solutionis*; the parties must be presumed to have intended that all modes of discharge admitted by the *lex loci solutionis* shall actually discharge the debt. If, therefore, the debtor is discharged—not by actual performance but by an order of the court of the place of performance—such order extinguishes his obligation wherever the action is brought, just as performance of contract extinguishes the original contractual obligation.

This principle was laid down by Lord Esher, M.R., in *Gibbs & Sons v. Société Industrielle et Commerciale des Métaux*²—

The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which

¹ See p. 144, *ante*.

² (1890), 25 Q.B.D. 399, 405.

a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought.

So far the conflictual principles are firmly established. They cover, as may be repeated, the case where the discharge in bankruptcy has been pronounced by a competent court administering the law governing the performance of the contract. The facts of the case may, however, vary from those just considered.

A contract may have been concluded at a place different from that where it was to be performed, and a discharge in bankruptcy may have been ordered not by the courts of the *lex loci solutionis*, as in our first example, but by the courts of the *lex loci contractus*. In this case, the question arises whether the discharge in bankruptcy pronounced by the courts of the *lex loci contractus* operates, also, as a complete discharge of the original obligation. A *dictum* of Lord Esher, M.R., in the *Gibbs* case¹ prompts the conclusion that this question has to be answered in the affirmative. Lord Esher observed that

where a contract is made or to be performed in a foreign country, so as to be a contract of the country, and there is a bankruptcy law, or the equivalent of a bankruptcy law by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country.

The same view has been adopted by Story² and Dicey;³ it is justified by an analogy to the similar case of a discharge of a contractual obligation by illegality. Consequently, if a discharge in bankruptcy is ordered by the courts of the *lex loci contractus* (which presumably governs the obligation of the contract as contrasted with its performance), the original obligation is extinguished.

¹ *Gibbs & Sons v. Société Industrielle et Commerciale des Métaux* (1890), 25 Q.B.D. 399, 407.

² S. 342.

³ Dicey, 5th ed., 948-9; see also Bovill, C.J., in *Ellis v. McHenry* (1871), L.R. 6 C.P. 228, 235.

Division III: The Law of the Person

CHAPTER XI

THE STATUS OF THE PERSON

I. GENERAL OBSERVATIONS

1. WHAT IS STATUS?

Every human community is founded upon social institutions which enjoy the special protection of the State since they concern interests too vital for the community to be regulated by individual discretion. Though these social institutions, like all relationships pertaining to private law, are in substance personal relationships between individuals, their initiation, duration or termination is protected by imperative legal rules. Personal relationships of this character are called relationships of status. "It is only in so far as the law recognises and gives effect to those relationships by giving them a legal sanction that they are included in the term 'status'." ¹

Among the personal relationships invested by the law with the character of status are the relationship between husband and wife which is recognised by the law as the status of marriage, and the position of a child, be it legitimate from its birth (status of legitimacy), illegitimate but legitimated by subsequent marriage of its parents (status of legitimation), or illegitimate (status of illegitimacy). In addition to these examples of civil status, there exist relationships of political status, such as nationality, ² the status of a political refugee ³ or that of an alien enemy. ⁴ Some kinds of status are based on social distinctions like rank, caste, class, others on differences of race or religion. A further group of status relationships has the common characteristic of having been designed to create legal disabilities, as e.g. in case of the status of infancy, unsoundness of mind, bankruptcy, prodigality or civil death.

It should be noted that a person stands usually not in one but in

¹ 2 Beale, 650; see also Brett, L.J., in *Niboyet v. Niboyet* (1878), 4 P.D. 1, 11; and Scott, L.J., in *re Luck's Settlement Trusts*, [1940] Ch. 864, 890.

² Lord Westbury in *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 457; see p. 65, *ante*.

³ See the definition of a "refugee coming from Germany" in the Convention concerning the Status of Refugees coming from Germany, of 10 February, 1938 (Cmd. 5780); on the definition of refugee children, see p. 288 (n. 4), *post*.

⁴ See p. 404, *post*.

a number¹ of relationships of status which in their entirety define his position in life. He may be a husband, a British subject, a peer and an infant at the same time. Each of these relationships of status is equally "a creature of the law and in that sense unreal and artificial."²

Although there are many varieties of relationships of status, the following definition taken from the American *Restatement*³ covers, it is believed, most⁴ of these varieties.

A "status" means a legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third parties and the state are concerned.⁵

The legal characteristic of status is, then, that it is generally not temporary nor terminable at will. In this respect, status is unlike contract. A contract of service or of partnership may be limited in time and terminable at the will of one or more of the parties thereto, but the status of marriage is contemplated as permanent and can be dissolved only by the State. This characteristic of status has been clearly defined by Lord Haldane in *Salvesen v. Administrator of Austrian Property*⁶ where the status of marriage was under consideration—

For what does status mean in this connection? Something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which Private International Law recognises as having been superadded to it by the authority of the State.

Status, as Scott, L.J., observed⁶—

affects not only the relations of the person to the public, but the relations of the public to him.

2. RECOGNITION OF A FOREIGN PERSONAL STATUS.

It has been seen that it is the sanction of the State which confers the character of status on a personal relationship. States, however, do not always agree in their valuation of social institutions. Some kinds of status, such as marriage or legitimacy, are universally recognised, while others, such as prodigality, civil death, discriminations for reasons of colour, race or religion, are recognised by some legal systems, but unknown to others. The different attitude adopted by

¹ It is unfortunate that there exists no distinctive plural of the word status.

² 2 Beale, 649.

³ *Restatement*, para. 119.

⁴ Not all of them; the position of a common carrier, still recognised as conferring status by the Common Law, is terminable at the mere will of the parties.

⁵ [1927] A.C. 641, 653.

⁶ *In re Luck's Settlement Trusts*, [1940] Ch. 860, 891.

various states in this respect gives rise to an interesting legal problem, namely, whether the courts of a particular country should give effect to a foreign status not recognised by the municipal law of that country.

The rules of the English conflict of laws regarding this problem are settled. They can be stated as follows—

- (a) If the status in question is recognised by English internal law, the English courts will fully recognise and give effect to the foreign status.
- (b) If the status in question is unknown to English internal law, the English courts will refuse to recognise and give effect to the foreign status.

These rules are deduced from the decisions which have been discussed on an earlier occasion.¹ They are further supported by most English² and American³ writers. The refusal of the English courts to give effect to a status, which they would not protect if the case had arisen within the ambit of their own municipal law, is explained by the close connection between status and the social institutions of a country. A country admitting status relationships not recognised in English municipal law differs from England in the basic principles of social life, and it would, therefore, be against the general policy of English law to admit such foreign status relationships.⁴

A view more favourable to the recognition of a foreign status is advanced by Professor Cheshire. The learned author, whilst not denying that a foreign status *conflicting* with English social institutions—e.g. that of slavery or discrimination of colour or race—is refused recognition in the English courts, argues that a foreign status should not be excluded from recognition merely for the reason that it is *unknown* to English law. Professor Cheshire⁵ says—

England is not the arbiter of the wisdom of foreign customs, and the Courts would scarcely increase the esteem in which they

¹ P. 63, *ante*.

² Dicey, 5th ed., Rule 136–8; *Halsbury's Laws of England*, Hailsham ed., Vol. VI, p. 198 (f.); Foote, 5th ed., p. 543. Dicey maintains (Rule 138) that a status recognised by the *lex domicilii* of the *de cuius* is equally recognised by English law, but that the latter does not necessarily give effect to the consequences resulting from that status. This distinction, which is not necessitated by judicial authority, appears artificial because in practice there is no difference between a foreign status not recognised in the English jurisdiction and a foreign status which cannot take effect in that jurisdiction.

³ Story, s. 104; 2 Beale, 651 (para. 120, 1); American *Restatement*, para. 120.

⁴ See above, p. 60; and C. K. Allen in 46 *L.Q.R.* (1930) 277, 309.

⁵ 3rd ed., p. 193. Professor Cheshire refers to *Baindail v. Baindail*, [1946] P. 122, and *Srimi Vasan v. Srimi Vasan*, [1946] P. 67; see p. 292, *post*. It is submitted that these cases have no bearing on the problem of unknown status; the issue was simply whether the *de cuius* was a married man when going through a second marriage ceremony in England.

are now held if they were to stigmatise a foreign institution as unworthy of recognition merely because it formed no part of English law.

It is difficult to subscribe to Professor Cheshire's view, which is so far unsupported by judicial authority¹ and not in accord with the teaching of the majority of English and American jurists.² If the courts had to analyse a foreign status with a view to determining whether it is merely unknown in England or whether it is, in addition, in conflict with essential concepts of the English social organisation, a research into the social background of the law would often be required which is hardly appropriate to the task of the courts and not necessitated by the requirements of justice. Furthermore, such investigation into the character of the foreign status would often bring about the very result which Professor Cheshire would like to avoid. For, if the courts were to continue, in these cases, to refuse recognition of a foreign status on the broad ground that it was unknown to English law, such reasoning would merely imply that social conditions are different in the foreign country from those existing in the English jurisdiction; but if they had to ascertain whether the foreign status conflicted with English social institutions or was repellent to English ideas of humanity, they would undoubtedly in many cases "stigmatise" foreign social institutions. It is, therefore, believed that the English courts will continue to withhold recognition to a foreign status that is unknown to English law whilst retaining their liberty to add, in appropriate cases, the observation that the foreign status is repugnant to English social institutions.

3. STATUS AND CAPACITY.

It has been maintained, particularly by older writers on the conflict of laws,³ that the capacity of a person to become a party to a legal transaction is a kind of status of that person. This view is based on the assumption that there exists a central conception of capacity which is applicable to the different branches of the law. It has been seen, however, in one of the introductory chapters⁴ where this question has been examined, that in the theory of the Common Law no general capacity in the sense in question is recognised, but that the capacity of a person differs according to the legal transaction under consideration. Thus, a person can be a lord of the manor at any age; in general,

¹ See Fry, J., in *Worms v. De Valdor* (1880), 49 L.J. Ch. D. 261; Farwell, J., in *In re Selol's Trust*, [1902] 1 Ch. 488.

² Dicey, 5th ed., p. 533, and the authors referred to on p. 270 (nn. 2 and 3), *ante*.

³ See those quoted by Allen, 46 L.Q.R. (1930) 277, 294. ⁴ P. 46, *ante*.

after the age of 7, he may be liable for tort ; before the age of 16, he may not marry ; if he concludes an onerous contract before the age of 21, he will not, in general, be liable thereon ; and before reaching 25 years of age, he is not capable of adopting another person. Capacity has, therefore, throughout this treatise, been treated as an incident of the transaction under consideration. Thus, the capacity to conclude a contract has been considered in our account of the law of contract, the capacity to convey land under the law of immovables, and so forth. A necessary corollary of the theory of the incidental character of capacity is the view that capacity is not a species of general status of a person.

4. STATUS AND PERSONAL LAW.

As regards the law governing the status of a person, it would appear that the relationships of status are too heterogeneous to permit the deduction of a general principle. This is even true if we confine our examination to the civil status of the person, the consideration of political status being outside the scope of our subject matter. The relationships of civil status are, however, subdivided into those of domestic and of non-domestic status. Relationships of domestic status "are connected with the home life of the parties to it,"¹ the most important of them being the status of marriage, of legitimacy and legitimation of a child, the relationships between parent and child, between guardian and ward, and between adopter and adopted child. On principle, relationships of domestic status should be governed by the personal law of the *de cuius* which, in English and American law, is the law of the domicil.² This principle has been stated by Brett, L.J., in *Niboyet v. Niboyet*³—

The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of a community. . . . As that relation and status are imposed by law, the only law which can impose or define such a relation or status (i.e. relative position) so as to bind an individual, is the law to which such individual is subject.

Even in the sphere of domestic status, however, the application of the *lex domicilii* is subject to so many qualifications that it has been doubted whether such a principle exists at all.⁴ For the group of relationships of non-domestic status, such as the status of a bankrupt

¹ 2 Beale, 650.

² See Dicey, 5th ed., Rule 137 ; *per* Farwell, J., in *In Re Luck's Settlement Trusts*, [1940] 1 Ch. 323, 327 ; Scott, L.J., [1940] Ch. 864, 890.

³ (1878), L.R. 4 P.D. 1, 11.

⁴ See the observations of Lord Greene, M.R., in *Baindail v. Baindail* [1946], P. 122, 128, quoted at p. 48, *ante* ; and Dicey, 5th ed., p. 532.

person,¹ the status of a person of unsound mind,² and that of a common carrier, no general principle can be deduced.

It is proposed to deal in this and the following chapter with the most important relationships of domestic status of a person. In view of the slender assistance provided by the *lex domicilii*, those relationships have to be reviewed separately. In the present chapter the status of legitimacy, of legitimation, and the relationship between guardian and ward will be reviewed, whilst in the following chapter the creation and dissolution of the status of marriage will be examined.

II. THE STATUS OF LEGITIMACY *

In order that a question concerning the *legitimacy* of a child may arise in the conflict of laws, the natural parents of that child must live in a union recognised as lawful by their community or, at least,

* **For further reading :** R. S. Welsh, "Legitimacy in the Conflict of Laws," (1947) 63 *L.Q.R.* 65; C. W. Taintor II, "Legitimation, Legitimacy and Recognition in the Conflict of Laws," 18 *Canadian Bar Review* (1940), pp. 589, 691.

¹ See p. 251, *ante*.

² Since the main purpose of the law dealing with persons of unsound mind is the protection of their person and property, jurisdiction in lunacy is based on residence, and not on domicile or nationality. The English courts are, therefore, entitled to order an inquiry into the state of mind of an alien or a British subject domiciled abroad if such persons are resident in England (*Re Burbridge*, [1902] 1 Ch. 426; *Re Princess Bariatiniski* (1843), 1 Ph. 375; *Re Sottomaior* (1874), L.R. 9 Ch. App. 677). Occasionally they have assumed jurisdiction over the person of a patient resident abroad but having property within the jurisdiction. (*Ex parte Southcot* (1751), 2 Ves. Sen. 401; *Re Scott* (1874), 22 W.R. 748).

Difficulties have arisen as regards the extra-territorial powers of a committee, curator or receiver. The powers of an English committee or receiver extend (or can be extended by order of the English court) to property of the patient situate in Scotland, Northern Ireland or another part of the British Empire (*Lunacy Act*, 1890, s. 131 (2) and s. 110; for details see Heywood & Massey's *Lunacy Practice*, 6th ed., 1939, 58-63). As to property situate in a foreign country that is not a member of the British Empire, the English court in appropriate cases (e.g. if no curator has been appointed by the courts of the foreign *lex situs*) will order the English committee or receiver to administer it.

As regards the claim of a foreign curator to property of the patient situate within the English jurisdiction, it is evident that the foreign curator is not entitled to deal with English immovables (*Grimwood v. Bartels* (1877), 46 L.J. Ch. 788). Movable property of a patient residing abroad who is an alien and not domiciled within the English jurisdiction can be collected by the foreign curator who is likewise entitled to give a valid discharge concerning such property (*Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Pélegrin v. Coutts & Co.*, [1915] 1 Ch. 696; *In re De Linden*, [1897] 1 Ch. 453). Movable property of an Englishman or a person domiciled in England, who has become of unsound mind whilst residing abroad, cannot of right be claimed by the foreign guardian (*New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666; *Re Garnier* (1872), L.R. 13 Eq. 532). In no case, however, is a foreign curator entitled to the English movables of the patient if English lunacy proceedings are pending or, at least, application has been made for the institution of such proceedings (*In re Stark* (1850), 2 Mac. & G. 174; Lindley, M.R., in *Didisheim v. London & Westminster Bank*, *supra*, p. 45), but in such a case the property of the patient is administered by the English committee or receiver.

believed by both or one of them to be lawful. If the intercourse of the parents was, to the knowledge of both, illicit, and if, at the time of the birth¹ of the child they did not live in an ostensible conjugal union, no legal problem regarding the legitimacy of the children can arise, but, in appropriate circumstances, the cognate problem may have to be examined whether the illegitimately born child has acquired legitimacy by an act of *legitimation*. Whether the legal problem involved is one of legitimacy or legitimation, depends, therefore, on the relationship between the natural parents of the child at the time of the birth of the child.

1. THE LAWFUL WEDLOCK THEORY.

The older view is that the status of legitimacy can only be attributed to a person born "in lawful wedlock," and must be withheld if the parents were not united in a marriage recognised by English law. This view is based on a generalisation of the doctrine in *Birtwhistle v. Vardill*.² There it was decided that an illegitimate child, who was legitimated under the law of Scotland by the subsequent marriage of his parents, could not take English real estate as the heir-at-law because it was a positive rule of English land law that a person not actually born within the pale of lawful matrimony was incapable of inheriting English land. However, upon closer investigation the decision does not support such a generalisation. The issue in *Birtwhistle v. Vardill*² was confined to the question of capacity to inherit English land, but did not concern the *general* test of legitimacy in English law. This can be clearly seen from the following formulation of the issue by Tindal, C.J., who delivered the opinion of the Judges.³

But admitting, for the sake of argument, and we are not called upon to give our opinion on that point, that *B*, legitimate in Scotland, is to be taken to be legitimate all over the world; the question still recurs, whether, for the purpose of constituting an heir to land in England, something more is not necessary to be proved on his part than such legitimacy.

In later decisions,⁴ the rule in *Birtwhistle v. Vardill* has received a restricted interpretation, which has the support of writers of the authority of Story⁵ and Phillimore.⁶ Dicey,⁷ though paying lip

¹ The child is legitimate even if, at the time of its birth, the marriage is dissolved by death or divorce; *In re Leman's Will Trusts*, (1945) 61 T.L.R. 566.

² (1835), 2 Cl. & F. 571; (1840), 7 Cl. & F. 895; see the dissenting judgment of Lush, L.J., in *Re Goodman's Trusts* (1881), 17 Ch. D. 266, 277; see p. 167, *ante*.

³ (1840), 7 Cl. & F. 895, at p. 937.

⁴ *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Re Andros* (1883), 24 Ch. D. 637, 639.

⁵ Story, s. 93.

⁶ Phillimore, Vol. IV, 3rd ed., s. 538, p. 410.

⁷ Dicey, 5th ed., Rule 145, p. 556; and p. 577 note (b); p. 949 (note 19).

service to the lawful wedlock theory, declines to accept its logical conclusions. The strongest argument against the lawful wedlock theory is derived from the fact that the Common Law recognises as legitimated, in certain well defined instances, illegitimately born children who have become legitimated under a foreign law.¹ It can, therefore, be assumed that birth in lawful wedlock is not an indispensable requirement for the recognition of a foreign legitimacy in English law.

2. THE STATUS THEORY.

The true test of legitimacy is derived from the conception of legitimacy as a personal status and conforms with the juristic postulate that the relationships of status of a person should be governed by his *lex domicilii*. This can be discerned in the following statement of Kay, J., in *In re Andros* ²—

It must now be treated as settled that any person legitimate according to the law of domicil of his father at his birth is legitimate everywhere.

In other words, the English conflict of laws bases the recognition of the legitimacy of a child not upon the narrow view that the union of its parents must, by English law, be recognised as a valid marriage, but on the broad rule that the *lex domicilii* is solely competent to attribute the status of legitimacy to the child, and that, if it has done so, that status must be recognised everywhere. The status theory of legitimacy is in accord with English judicial authorities ³ and is supported by Professor Cheshire,⁴ M. Wolff ⁵ and A. H. Robertson,⁶ and by the American authorities.⁷

Since the legitimacy of the child is determined by the law of the domicil of the child at the time of its birth, it becomes important to ascertain that place with precision. A child has a dependent domicil, its domicil depending, if it is legitimate, on that of its father, and if

¹ See *post*, p. 280; and *In re Luck's Settlement Trusts*, [1940] 1 Ch. 323.

² (1883), 24 Ch. D. 637, 638. *In re Bischoffsheim*; *Cassel v. Grant*, [1948] 1 Ch. 79.

³ Romer, J., in *In re Bischoffsheim*; *Cassel v. Grant*, [1948] 1 Ch. 79; Farwell, J., in *In re Luck's Will Trusts*, [1940] 1 Ch. 323, 327; Cotton and James, L.J.J., in *In re Goodman's Trusts* (1881), 17 Ch. D. 266, 292-3, 296-7; *Re Don's Estate* (1857), 4 Drewry 194; *R. v. Humphreys*, [1914] 3 K.B. 1237; Lord Cranworth in *Shaw v. Gould* (1868), L.R. 3 H.L. 55, 70.

⁴ Cheshire, 3rd ed., p. 505.

⁵ M. Wolff, pp. 388-9.

⁶ "Characterisation in the Conflict of Laws," *Harvard Studies in the Conflict of Laws*, Vol. IV, 1940, p. 134.

⁷ *Restatement*, para. 137; 2 Beale, 704, para. 138, 1, and cases quoted there in n. 3.

it is illegitimate, on that of its mother. To apply the dependent domicil of the child as the test for its legitimacy would clearly be begging the question,¹ because that domicil depends, in its turn, on the status of the child. In many cases this difficulty is only apparent because a woman, who lives with a man in an ostensible (though invalid) marriage, has regularly acquired a domicil of choice which coincides with the domicil of the man,² and the law prevailing at the common domicil of the parents is the *lex domicilii* of the child and determines whether it is legitimate or not. In principle, however, the law of the domicil of the natural father decides the question of legitimacy of the child, as Stirling, J., said in *In re Grove* ³—

If the parents have different domicils (as may happen where they are not married), the authorities shew that the domicil of the father is to be regarded, and not that of the mother.

The status theory can, therefore, be summed up as follows—

A child is considered legitimate if the law of the place where its natural father is domiciled at the time of its birth attributes the status of legitimacy to the child.

The distinguishing feature between the two theories of status and of lawful wedlock is that according to the status theory, a child might be legitimate though its parents were not joined in a valid marriage in the English sense, whilst according to the lawful wedlock theory such a contingency would be inadmissible. The logical separation of the status of the child from the existence of a valid marriage of its parents was recognised by Romer, J., in *In re Bischoffsheim; Cassel v. Grant*,⁴

where the issue was whether W., who was born in New York, was the legitimate child of his parents. After the death of her first husband, his mother had gone to New York and, in 1914,⁵ married there her deceased husband's brother. W. was her son by the second husband. According to English law, the second marriage was invalid because the spouses were related within the degrees prohibited by Lord Lyndhurst's Marriage Act,

¹ R. S. Welsh, *op. cit.*, pp. 69 *ss.*, thinks that this difficulty constitutes a *circulus inextricabilis*. This result is avoided if the test of natural paternity is adopted, as suggested in the text.

² *Post*, p. 296.

³ (1889), 40 Ch. D. 216, 224; *In re Andros* (1883), 24 Ch. D. 637; *In re Luck's Settlement Trusts*, [1940] Ch. 323; [1940] Ch. 864, 883.

⁴ [1948] 1 Ch. 79; see also *Khooh Hooi Leong v. Khooh Hean Kwee*, [1926] A.C. 529, 543. In English municipal law, the separation of the questions of existence of marriage and status of children is recognised by the Matrimonial Causes Act, 1937, Sect. 7 (2), which provides that in certain cases a child born of a marriage annulled by the court shall be legitimate.

⁵ At that time, the Deceased Brother's Widow's Marriage Act, 1921, was not yet in force (see p. 307 (n. 5). *post*).

1835, but according to the law of New York the marriage was valid. It was doubtful whether W.'s parents, at the time of their marriage, had divested themselves of their English domicile of origin and acquired a domicile of choice in New York, but it was admitted that they had acquired a domicile of choice in New York at the time of the birth of W.

Romer, J., said that W. "undoubtedly received at birth the status of legitimacy from the law of his domicile of origin, and such status is, in general, accorded international recognition," and observed later on: "The conclusion which I have formed and expressed upon the legitimacy at birth of W. relieves me of the necessity of inquiring into the domicile of his parents at the time of their marriage in New York."

3. PRACTICAL CONSEQUENCES FROM THE APPLICATION OF THE STATUS THEORY BY ENGLISH LAW.

The acceptance of the status theory in the English conflict of laws leads to two conclusions of great practical importance. By the separation of the legal concepts of legitimacy and matrimony, it has become possible to accord full legal status to children of polygamous marriages and of so-called putative marriages.

A. Children of polygamous marriages.* As regards children born of polygamous marriages¹ the following problem may arise—

A Mohammedan domiciled in Pakistan marries two wives according to the rites of his religion, and has children by each wife. Is his issue, which is undoubtedly lawful by the law of Pakistan, recognised as legitimate by English law?

The marriage between the Mohammedan and his wives does not have the same consequences in English law as a Christian marriage¹ and would, therefore, not be dissoluble by the English courts if the Mohammedan later transferred his domicile to England, but, from the point of view of the status theory, that fact is not relevant—

With regard to the wife, the issue is the validity of the marriage to which she was a party; with regard to the children the issue is their right to the status of legitimacy. The wife's position cannot be considered apart from the marriage, but the position of the children may be.²

The decision depends, therefore, entirely on the law of domicile of the children at the time of their birth. If they are considered legitimate by that law, their status of legitimacy must be recognised everywhere;

* **For further reading:** W. E. Beckett, "The recognition of polygamous marriages under English Law" in 48 *L.Q.R.* 341; and S. G. Vesey-FitzGerald, "Nachimson's and Hyde's case" in 47 *L.Q.R.* (1931) 270.

¹ On polygamous marriages, see p. 292, *post*.

² Tunes, C.J., in *Seedat's Executors v. The Master*, [1917] A.D. 302, 312. This decision of the Appellate Division of the Supreme Court of South Africa can claim persuasive authority in the English courts.

otherwise they cannot be considered as legitimate. In our example, the children are legitimate because they have acquired that status by the law of Pakistan, which is the law of their domicile at the time of their birth.

Let us now vary our example. Let us imagine that the Mohammedan whilst domiciled in Pakistan had two children by his first wife and two children by his second wife. Let us further assume that he and his family travel to England and acquire a domicile of choice here, and that his second wife gives birth to a third child X, after the Mohammedan has acquired an English domicile. Would X be legitimate?

The answer to this question would appear to be in the negative. Since X was, at the time of his birth, domiciled in England, and since English municipal law does not recognise the legitimacy of the offspring of a polygamous marriage, X cannot have acquired the status of legitimacy. X has, therefore, a different legal status from his brothers and sisters.

Though the English courts have not yet been called upon to decide the question of legitimacy of children of polygamous marriages,¹ strong *dicta*² support the inference that that would be the view which they are likely to adopt.

B. Children of putative marriages. On the basis of the status theory, it is, further, possible to accord legitimacy to children born in so-called putative marriages, i.e. marriages celebrated by the spouses (or at least one of them)³ in the honest belief that they are valid, whilst they are actually invalid and a nullity in law.⁴

The doctrine that children born of a putative marriage should, by authority of the law, be regarded as legal, originates in the Canon Law and has its reason in the desire to alleviate an evident hardship to parents and children. The doctrine still applies in Scotland, the

¹ *In re Bethell*, *Bethell v. Hildyard* (1888), 38 Ch. D. 220 (see p. 37, *ante*) is not to the point because there the father was still domiciled in England. The child of Teepoo was, therefore, illegitimate by its *lex domicilii*; in *Lord Sinha's Claim*, *H.L. Jour.*, 1939, Vol. 171, 350 (p. 37, *ante*), the marriage of the parents was monogamous in the eyes of English law, and not polygamous.

² Lord Greene, M.R., in *Baindail v. Baindail*, [1946] P. 122, at p. 127; Lord Maugham, L.C., in *Lord Sinha's Claim*, *H.L. Jour.*, 1939, Vol. 171, 350; *In re Ullee* (1885), 53 L.T. 711; *In the Estate of Abdul Majid Belshah* (1928), B.Y.B.I.L., 185.

³ If only one party concludes the marriage in good faith, the effect of the putative marriage is produced only in favour of that party and of the children; see *Berthiaume v. Dastous*, [1930] A.C. 79, 87.

⁴ Compare the definition of a putative marriage in Arts. 163 and 164 of the Civil Code of Quebec (modelled on the *Code Civil*) in *Berthiaume v. Dastous*, [1930] A.C. 79, 87, with the definition contained in the opinion of the Scottish lawyers in *Shaw v. Gould (Wilson's Trusts)* (1865), L.R. 1 Eq. 247, 249.

Province of Quebec and numerous continental countries, but has been abolished in England.¹

A putative marriage was at issue in the Canadian case of *Berthiaume v. Dastous*² which came before the Privy Council—

In this case a Canadian woman went through a marriage ceremony with a Canadian in Paris. Both were Roman Catholics and the ceremony took place before a Roman Catholic priest. The "marriage" was a complete nullity in law because French law does not consider the religious ceremony alone as sufficient but requires that the marriage must first be solemnised by the civil authorities, a provision which was not complied with in this case. This fact had escaped the notice of the priest who mistook a paper produced by the man as the civil marriage certificate. The woman acted in perfect good faith and discovered the true facts only after she had lived with the man for 13 years and wanted to institute divorce proceedings on the ground of his infidelity.

The woman successfully claimed alimony to which she was entitled by the law of Quebec as a *bona fide* party to a putative marriage. Since the union was childless, no question of legitimacy arose.

In English law, children born of a foreign putative marriage are recognised as legitimate, if and when such status is attributed to them by their *lex domicilii* at the time of their birth. It is, however, noteworthy that the foreign *lex domicilii* frequently attributes that status to children of a putative marriage only if the marriage of their parents complies with certain conditions. Thus, in Scottish law, an invalid marriage produces the legal effect of a putative marriage only if the *bona fide* mistake of the spouse concerned a point of fact; a mistake in law, e.g. as to the legal validity of a previous divorce, is not regarded sufficient by Scottish law to produce the legal consequences of a putative marriage. If, in such cases, the foreign *lex domicilii* denies the status of legitimacy to the children, the English courts must accept this verdict and also consider the children as illegitimate.³ This was decided in the leading case of *Shaw v. Gould*,⁴ where

Miss Hickson, aged 16 years, was induced by fraud to marry one Buxton who was domiciled in England. The marriage was not consummated and Buxton was convicted for the fraud. Later a Mr. Shaw intended to marry Miss Hickson. As her marriage to Buxton was never dissolved, Buxton was induced, for a monetary consideration, to go temporarily to Scotland, where a divorce decree against him was procured.

Subsequently, Miss Hickson married Mr. Shaw in Scotland, and the

¹ See *Berthiaume v. Dastous*, [1930] A.C. 79, 87.

² [1930] A.C. 79.

³ *Shaw v. Gould* (1865), L.R. 1 Eq. 247; (reported *sub nom. In re Wilson's Trusts*) (1868), L.R. 3 H.L. 55; *In re Stirling*, [1908] 2 Ch. 344.

⁴ (1865), L.R. 1 Eq. 247; (reported *sub nom. In re Wilson's Trusts*) (1868), L.R. 3 H.L. 55.

parties lived permanently there. Several children were born, including the plaintiff.

The question before the Court was whether the plaintiff was entitled to take under a will of an English uncle of Miss Hickson by which the uncle had bequeathed a gift to the "lawfully begotten" children of Miss Hickson. The bequests had been paid into the English court and the plaintiff claimed them there.

The House of Lords decided that the plaintiff could not be regarded as the lawful child of Miss Hickson's union with Mr. Shaw. The dissolution of her marriage with Buxton was invalid because it was pronounced not by the courts of the matrimonial domicile of the spouses but by a court invoked collusively "for the sole purpose of making it instrumental to the attainment of their objects."¹

The plaintiff, then, invoked the Scottish doctrine of putative marriage.² The House of Lords rejected this argument too, for the reasons set out by Lord Chelmsford³ in the following passage—

"The authority of text writers was referred to upon this point, all of whom confine the ignorance which renders children of a void marriage legitimate to ignorance of some fact by the parents. In the present case there was no fact bearing on the validity of the second marriage unknown to either of the parties to it. They drew their conclusions from known facts and acted upon their own judgment as to the correctness of the advice, given them upon the subject of the decree of divorce. Although they may have proceeded *bona fide* upon this advice, still their case is not brought within the principle of the law . . . as the ignorance imputed is not of fact, but of law."

III. THE STATUS OF LEGITIMATION

A child born out of wedlock and admittedly illegitimate at the time of its birth may become legitimated⁴ in either of the following ways: The law of its domicile may confer upon it the status of a legitimate child by a general or special act of State (*per rescriptum principis*), or the law of its domicile may accept the doctrine that an illegitimate child becomes legitimated by the subsequent marriage of its parents (*per subsequens matrimonium*). While the principles applicable to the latter contingency were established relatively early, it was not until 1940 that a case was taken to the courts that involved a legitimation *per rescriptum principis*;⁵ and it is by no means settled whether both contingencies are subject to the same or to different considerations in the English conflict of laws.

1. LEGITIMATION BY SUBSEQUENT MARRIAGE.

Many foreign laws, including the law of Scotland, have since early times accepted the doctrine of the Canon Law that a child born out of

¹ *Per* Lord Chelmsford, at p. 79.

² (1865), L.R., 1 Eq. 247 249.

³ At p. 79; see also *per* Lord Colonsay at p. 97.

⁴ F. A. Mann, "Legitimation and Adoption in Private International Law,"

57 L.Q.R. (1941), 112.

⁵ *In re Luck's Settlement Trusts*, [1940] Ch. 323, 864.

wedlock shall be regarded as legitimate if its parents marry after its birth. Attempts have been made to introduce this doctrine into English law. In the Parliament of Merton (1235-6) the suggestion of the spiritual lords to introduce into English law legitimation by subsequent marriage was met by the famous "*nolumus leges Angliæ mutare*"¹ of the temporal lords. Blackstone² states that one of the main reasons why the Common Law declined to receive the doctrine of legitimation by subsequent marriage was the desire to encourage matrimony if a child was begotten before the marriage of its parents. About 700 years after the Statute of Merton, English law abandoned its resistance and by the Legitimacy Act, 1926, legitimation by subsequent marriage was admitted.

That Act provides that an illegitimate person becomes legitimate on the marriage of the parents if the father is, at the date of the marriage, domiciled in England or Wales. The legitimation, which takes effect as from the date of the marriage of the parents,³ places the legitimated person generally in the position of a person born legitimate,⁴ except that the legitimated person cannot claim any dignity or title of honour⁵ or any property connected therewith.⁶ The Act also withholds the privilege of legitimation from the offspring of an adulterous union.⁷

After this survey of the present English internal law, the rules of the conflict of laws concerning the effect of a foreign legitimation by subsequent marriage have to be considered. Though to-day these rules are laid down in the Act of 1926, it is still necessary to consider the relevant principles of the Common Law in order to understand the modern law.

A. The rules of Common Law on legitimation by subsequent marriage. The Common Law, which stubbornly resisted the introduction of legitimation by subsequent marriage in the municipal sphere, adopted a more liberal attitude with respect to the recognition of a foreign legitimation. The conditions subject to which the Common Law recognises the foreign legitimation of an illegitimate child by the subsequent marriage of its parents are that the institution of legitima-

¹ On the history of English bastardy law see Lush, L.J., in *In re Goodman's Trusts* (1881), 17 Ch. D. 266, 271, and 26 L.Q.R. 255.

² Blackstone, *op. cit.*, p. 455.

³ Or, if the marriage took place prior to the coming into force of the Act, as from 1st January, 1927. A declaration of legitimacy should be obtained, *Green v. Green*, [1929] P. 101.

⁴ But a legitimated person cannot take as a child under the will of a testator who died before the legitimation of that person, *In re Hepworth*, [1930] 1 Ch. 750.

⁵ S. 10.

⁶ S. 3 (3).

⁷ S. 1 (2).

tion by subsequent marriage must form part both of the law of domicile of the child's father at the time of its birth, and of the law of domicile of the father when concluding the marriage. Both *leges domicilii* have to concur to make the child legal; the former law of domicile creates the potentiality to have the child's status changed, and the latter law of domicile effects the change.¹ This was finally settled in *In re Grove*² where the reasons for this rule were explained by Cotton, L.J., as follows³—

What is really necessary, I think, is that the father should at the time of the birth of the child be domiciled in a country allowing legitimation, so as to give to the child the capacity of being made legitimate by a subsequent marriage. But it is the subsequent marriage which gives the legitimacy to a child who has at its birth in consequence of its father's domicile the capacity of being made legitimate by a subsequent marriage.

The legal status of a child legitimated under foreign law was fully recognised at Common Law with respect to personalty and to testamentary succession to realty; thus a legitimated person could, at the death of his father, succeed to the personal estate of the deceased⁴ and to such realty as was specifically devised to him by the testator.⁵ But the legitimated person could not take English realty as the heir-at-law; i.e. he could not inherit English land *ab intestato*. Within these narrow limits, the rule in *Birtwhistle v. Vardill*⁶ prevailed, providing that only a person born in lawful wedlock could take English land as the heir-at-law, a rule which has been referred to by James, L.J.,⁷ as "only an additional instance of the many anomalies which at that time affected the descent of land." The same learned Judge observed further—

The English heirship, the descent of English land, required not only that the man should be legitimate, but as it were *porphyrogenitus*, born legitimate within the narrowest pale of English legitimacy.⁸

Already before the Legitimacy Act, 1926, the rule in *Birtwhistle v. Vardill* had lost much of its significance since, by the Administration

¹ *In re Luck's Settlement Trusts*, [1940] Ch. 864, 883.

² (1889), 40 Ch. D. 216; see further *In re Wright's Trusts* (1856), 2 K. & J. 595; *Udny v. Udny* (1869), L.R. 1 H.L. (Sc.) 44; *Re Goodmann's Trusts* (1881), 17 Ch. D. 266; *In re Andros. Andros v. Andros* (1883), 24 Ch. D. 637; *In re Grey's Trusts*, [1892] 3 Ch. 88; *In re Askew. Marjoribanks v. Askew*, [1930], 2 Ch. 259, 264.

³ At p. 232; see further *In re Luck's Settlement Trusts*, [1940] 1 Ch. 323, 864.

⁴ *In re Andros. Andros v. Andros* (1883), 24 Ch. D. 637.

⁵ *In re Grey's Trusts*, [1892] 3 Ch. 88, 93.

⁶ (1835), 2 Cl. & F. 571; (1840) 7 Cl. & F. 895.

⁷ *In Re Goodman's Trusts* (1881), 17 Ch. D. 266, 299.

⁸ At p. 299.

of Estates Act, 1925, the descent of land to the heir has been abolished¹ except in the case of entailed interests.² The Legitimacy Act, 1926, has then almost completely repealed the rule by providing that a legitimated person shall be entitled to take any interest "in the like manner as if the legitimated person had been born legitimate."³ Consequently, the legitimated person can now take entailed interests as an heir-at-law. To-day, the rule in *Birtwhistle v. Vardill* applies only to those interests in land which are exempted from the operation of the Legitimacy Act, 1926, i.e. to real interests connected with a dignity or title of honour.⁴

B. The rules of the Legitimacy Act, 1926. The principle of the Common Law that a foreign legitimation is only recognised if admitted by the *leges domicilii* of the father both at the time of the child's birth and of the subsequent marriage of the father, has been considerably mitigated by the Legitimacy Act, 1926, which provides in Sect. 8—

Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country, other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognised as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law.

The Act adopts, in short, one test for the recognition of a foreign legitimation instead of the two criteria of the Common Law. The sole test is henceforth the *lex domicilii* of the father at the time of the marriage, his *lex domicilii* at the time of the birth of the child no longer being relevant.

An interesting problem arises under the Act with respect to the legitimation of children born of adulterous unions.⁵ It will be remembered that the Act withholds legitimation from the children of such a union if their parents marry after the adulterous spouse has obtained a divorce.⁶ Foreign legitimation laws do not always impose similar restrictions. In these cases the question arises whether the restriction of English law applies only to cases where the father was, at the conclusion of the marriage, domiciled in England or Wales, or extends

¹ S. 45 (1).

² S. 45 (2).

³ S. 3 (1) and (2).

⁴ S. 3 (3) and s. 10 (1). These provisions apply to real and personal property alike.

⁵ See Cheshire, 3rd ed., p. 517; 12 *B.Y.B.I.L.* (1931), p. 186, note 1, and 13 *B.Y.B.I.L.* (1932), p. 173.

⁶ S. 1 (2).

also to cases where he was, at that time, domiciled in a foreign country under whose laws the children have acquired legitimation notwithstanding their having been born of an adulterous union. It has been decided in *Collins v. A.G.*¹ that the restriction of the Act applies only to municipal and not to foreign legitimations. Consequently, children born of an adulterous union are recognised as legitimated if the foreign law of the domicil of the father at the time of the marriage confers that status on them. The reason for this distinction is that, in the case of a municipal legitimation, the status of legitimation is *acquired* by virtue of the Act which expressly withholds that status from the offspring of an adulterous union, whilst, in the case of a foreign legitimation, the personal status of legitimation is acquired under a foreign law and is merely *recognised* by the Act for the purposes of the English jurisdiction, as it should be recognised, in principle, everywhere. This solution is in harmony with the status theory and is also reconcilable with the terms of the Act.²

A legitimation under the Legitimacy Act, 1926,³ does not confer upon the legitimated person all the rights of a legitimately born child. First, the Act affects merely the civil, and not the political, status of the *de cuius*. Thus, under the British Nationality and Status of Aliens Acts, 1914 to 1922, a person whose father possesses British nationality is to be deemed a British subject.⁴ This political status can be claimed only by persons who are legitimate at their birth, and not by persons who are legitimated by subsequent marriage.⁵ This position will, however, be reversed when the British Nationality Bill, 1948, is passed into law; the Bill proposes⁶ that a legitimated person shall, for the purposes of determining his citizenship, be treated as if he had been born legitimate. Secondly, it is always a matter of construction, whether the term "children" or "lawfully begotten children" in a will or other legal instrument refers only to the legitimate, or includes also the legitimated, issue of the *de cuius*.⁷

¹ (1931), 47 T.L.R. 484. *In re Luck's Settlement Trusts*, [1940] 1 Ch. 323.

² 12 B.Y.B.I.L. (1931), p. 186, note 1.

³ A declaration of legitimacy under the Act is obtainable on petition to the High Court or County Court (s. 2).

⁴ Subject to certain conditions; Sect. 1.

⁵ *Abraham v. A.G.*, [1934] P. 17; *Shedden v. Patrick* (1854), 1 Macq. H.L. 535. Where children of polygamous and putative marriages are recognised as legitimate by English law (*ante*, pp. 277 ss.), they can claim the status of a British subject if their father possesses British nationality and the other conditions of Sect. 1 of the Act are fulfilled; see J. Mervyn Jones, *British Nationality*, 1947, 134.

⁶ Cl. 23.

⁷ Dicey, 5th ed., p. 950, note u; *In re Bleckly*; *Sidebotham v. Bleckly*, [1920] 1 Ch. 450, 460; *Hill v. Crook* (1873), L.R. 6 H.L. 265; *In re Taylor, Hockley v. O'Neal* (1925), Ch. 739.

The Legitimacy Act, 1926, has provided no canon of construction for the determination of this question. For the assessment of death duties, however, the Act provides that legitimated persons shall stand in the same position as persons born legitimate.¹

2. LEGITIMATION BY ACT OF STATE.

Whilst it is not disputed that an illegitimate person can be legitimated in England by Act of Parliament, this power has been rarely invoked in modern times.² As regards foreign legitimations by enactment or other act of State, it has been held by the majority of the Court of Appeal in *Re Luck's Settlement Trusts*,³ that such a measure is governed by the same principles as apply to the case of a legitimation *per subsequens matrimonium*. The facts of the case were as follows—

The *de cuius* was the illegitimate son of a man domiciled in England at the time of the birth of the son. Subsequently the father acquired a domicile of choice in California, U.S.A., and married there a woman who was not the mother of the *de cuius*.

According to the Civil Code of California, an illegitimate child is deemed "for all purposes legitimate from the time of its birth" if the father publicly acknowledges the child as his own and receives it as such into his family, with the consent of his wife, if married.⁴ The *de cuius* was duly acknowledged and received by the father and thereupon had become legitimated by Californian law.

The issue before the English court was whether the *de cuius* was entitled to take under a settlement made by his grandfather and settling certain property, *inter alia*, upon the father of the *de cuius* and, after the father's death, upon the father's lawful children who were living at the expiration of 21 years after the settlor's death. At the crucial moment the *de cuius* was living but not yet legitimated, and the question was whether English law would recognise a provision of the law of domicile of the *de cuius* legitimating him retrospectively as from his birth.

Sir Wilfrid Greene, M.R., and Luxmoore, L.J., held that the issue was governed by the same principles as applied to the case of a legitimation *per subsequens matrimonium*. Accordingly, the *de cuius* was still illegitimate in the eyes of English law at the crucial moment because the law of domicile of his father at the time of his birth (English law) did not endow him with the potentiality to have his status changed subsequently by means of legitimation by "adoption," and the change of status provided by the law of California could, therefore, not take effect.

Scott L.J., in a strong dissenting judgment followed the decision of Farwell J. in the Chancery Division. The learned Judge based his judgment

¹ Sect. 7.

² An historical example is the legitimation of the bastard children of John of Gaunt by a statute of Richard II; see 4 Co. Inst. 36; Blackstone, *Commentaries*, 4th ed., I, p. 435; Halsbury's *Laws of England*, 2nd ed., Vol. 2, 564.

³ [1940] 1 Ch. 323.

⁴ At pp. 328-9. This procedure is called by the Californian Code, an adoption—a terminology inconsistent with the customary connotation of the word.

explicitly on the status theory and refused to decide the case on principles similar to those governing the recognition of a foreign legitimation by subsequent marriage, which type of legitimation he carefully distinguished from legitimation by act of State.

IV. THE STATUS OF INFANTS UNDER GUARDIANSHIP

Two principles are discernible in this branch of the law. First, the relationship between guardian and ward, which constitutes a relationship of domestic status, should be governed by the *lex domicilii* of the ward. This rule may, however, conflict with the second principle, that in all questions concerning infants or their property the benefit of the infant should be the guiding consideration. The first of these principles is deduced from the status character of the relationship under examination, while the second one rests upon public policy, and more particularly upon the doctrine that the king as *pater patriæ* has the care of all infants in his jurisdiction.¹ Whenever these two principles conflict, the second one prevails,² but, when the benefit of the infant is not affected, the English courts are inclined to give effect to the first principle.

1. THE PARAMOUNT PRINCIPLE.

That the benefit of the infant is the overriding consideration in the English courts has now been laid down in the Guardianship of Infants Act, 1925,³ Sect. 1 of which provides—

Where in any proceeding before any court . . . the custody or upbringing of an infant, or the administration of any property belonging to or held in trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

These principles apply without exception to all cases where the English

¹ *Eyre v. Countess of Shaftesbury* (1722), 2 P. Wms. 103, 118; *In re X's Settlement*, [1945] Ch. 44; J. D. Chambers, on *Infants*, London, 1842, 2-3.

² *In re Liddell's Settlement Trusts*, [1936] Ch. 365; *In re B's Settlement* (1940), 109 L.J. Ch. 20; *Stuart v. Bute* (1861), 9 H.L. Cas. 440; *Dawson v. Jay* (1854), 3 De G.M. & G. 764.

³ This Act was passed in order to establish equality between the sexes in matters of guardianship—an intention which accounts for the wording of the second part of the section quoted *supra*.

courts are concerned with the relationship of guardian and ward, and they extend, in particular, to children domiciled abroad or being foreign nationals.¹ The general effect of Sect. 1 of the Guardianship of Infants Act, 1925, was explained by Morton, J., when refusing to make an order for the return to its father of a Belgian infant though the Belgian court had given the father custody of the infant and ordered its return from England to Belgium.² The learned Judge said—

In my view, under Sect. 1 of the Guardianship of Infants Act, 1925, I am bound to consider first the welfare of the infant, and to treat his welfare as being the paramount consideration. In so doing, I ought to give due weight to any views formed by the courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the courts of any other country.

The welfare of the infant, though the overriding consideration, is not the sole consideration to be contemplated by the courts.³ The orders of the competent foreign court, or the wishes of the duly appointed foreign guardian as regards the custody or movable property of the infant are the next considerations which have to be taken into account.⁴

2. JURISDICTION OF THE ENGLISH COURTS.

A. Jurisdiction over the person of infants. The English courts have jurisdiction over the person of infants in any one of the following cases—

- (a) if the infant is domiciled within the English jurisdiction,
- (b) if the infant is a British subject,⁵
- (c) if the infant is resident in the English jurisdiction.⁶

The first two of these cases are intrinsically different from the third. In the first two cases the children may not be within the jurisdiction, and the issue will mainly concern such questions as the

¹ *In re D.*, [1943] 1 Ch. 305, 306.

² *In re B's Settlement* (1940), 109 L.J. Ch. 20; see also *In re Liddell's Settlement Trusts*, [1936] Ch. 365, 374, which, however, dealt with children of British parents.

³ Eversley, *Domestic Relations*, 5th ed., London, 1937, 413.

⁴ See *Stuart v. Bute* (1861), 9 H.L. Cas. 440, 464-5; *Nugent v. Vetzera* (1866), L.R. 2 Eq. 104; *De Savini v. Lousada* (1870), 18 W.R. 425; *Monaco v. Monaco*, *The Times*, 23 March, 1937.

⁵ *In re Willoughby* (1885), 30 Ch. D. 324, 328. *In re Liddell's Settlement Trusts*, *supra*. *Hope v. Hope* (1854), 4 De G.M. & G. 328.

⁶ *Nugent v. Vetzera*, *supra*; *De Savini v. Lousada*, *supra*; *Monaco v. Monaco*, *supra*; *In re B's Settlement*, *supra*; *Johnstone v. Beattie* (1843), 10 Cl. & F. 44, 88.

appointment or removal of an English guardian, or the return to England of a ward who has been removed out of the English jurisdiction without the consent of its guardian.¹ The assumption by the English courts of jurisdiction over infants who, though being born and domiciled abroad, are British subjects has its ground in the special care of the Crown as *pater patriæ* for all children² born in the British allegiance. When assuming jurisdiction over infants living abroad, the English court may order the parent or other person having control over the infant to bring back the infant into the English jurisdiction; such an order of the court may, in appropriate cases, be served out of the jurisdiction in accordance with Order 11 and may, in case of disobedience, be enforced by a writ of sequestration or otherwise.³

The jurisdiction of the English court extends, further, over the person of all infants resident in the English jurisdiction. This category includes infants living in England but who are domiciled abroad or are foreign nationals.⁴ In these cases the English courts will generally conform with the arrangement ordered by a competent foreign court or with the discretion of a duly appointed foreign guardian⁵ as to the custody of the infant and will, in particular, order the removal of the infant from England to its own country⁶ unless the paramount consideration, i.e. the welfare of the infant, prohibits such a measure.⁷

¹ *Stuart v. Bute*, [1861] 9 H.L.C. 440.

² *Hope v. Hope* (1854), De G.M. & G. 328, 345; *Brown v. Collins* (1883), 25 Ch. D. 56; *In re X's Settlement*, [1945] Ch. 44.

³ *Hope v. Hope*, *supra*; *In re Liddell's Settlement Trusts*, *supra*.

⁴ *In re D.*, [1943] 1 Ch. 305. In the case of refugee children the Home Secretary may appoint a guardian under the Guardianship (Refugee Children) Act, 1944, Sect. 1. Refugee children are defined as persons who for the time being are in England and who (1) have arrived in the United Kingdom after the end of 1936 in consequence of War (whether foreign or civil) or of religious racial or political persecution and had at the time of their arrival not reached the age of 16 years, (2) have no parent or ward in the United Kingdom and (3) have not attained the age of 21 years and in the case of females, are not married. The Act of 1944 will remain in force until 10th December 1950 (Emergency Laws (Miscellaneous Provisions) Act, 1947, s.5(2)d).

⁵ It has never been decided which foreign court is competent to appoint a guardian to a foreign infant (or to make orders concerning the person or property of such an infant). It is evident that the court of the foreign *lex domicilii* of the infant has such powers, but, if an infant being the national of state A is domiciled in state B, it is doubtful whether the court of the foreign nationality would be regarded as competent to appoint a guardian. Dicey, 5th ed., p. 556, thinks that the English courts would refuse recognition of such a guardian unless he is recognised by the *lex domicilii* of the infant, but it appears more probable that the English courts would recognise the guardian appointed by the court of the child's nationality because the care over the children of his nationals is an inherent duty of every sovereign as *parens patriæ* (see *In re Bourgoise*, [1889] L.R. 41 Ch. D. 310).

⁶ *Nugent v. Vetzera* (1866), L.R. 2 Eq. 104; *De Savini v. Lousada* (1870), 18 W.R. 425; *Monaco v. Monaco*, *The Times*, 23 March, 1937.

⁷ *Re B's Settlement* (1940), 109 L.J. Ch. 20; *In re D.*, [1943] 1 Ch. 305; *In re X's Settlement*, [1945] Ch. 44.

B. Jurisdiction over the property of infants. A guardian appointed by the English courts or otherwise deriving his authority from English law ¹ must administer the estate of the infant according to English law ² and, being in the position of a trustee, acts under the supervision of the English court. It is conceivable that he may have to claim immovable or movable property of the infant situate abroad, and that his claim to such property may be contested by persons alleging to have the care of the infant's property in the foreign jurisdiction. These problems are, however, outside the province of English law.

As to the converse case of a foreign guardian claiming property of the infant situate within the English jurisdiction, it should be noted that the foreign guardian cannot make such a claim *virtute officii* since according to the Common Law the powers of a guardian are limited to the territory of the state from which he derives his authority.³ The English court may, however, appoint the foreign guardian as guardian in the English jurisdiction or, without so appointing him, may allow him to perform certain administrative acts in that jurisdiction, such as accepting money due to the ward. Generally, the English court, in the exercise of its discretion, will defer to the claim of the foreign guardian,⁴ but it is not bound to do so and will refuse to entertain such a claim if the welfare of the infant demands a different arrangement.⁵ Thus Kekewich, J., said ⁶—

It appears to me that I ought to consider whether when the fund is handed over to the guardian it will be properly applied for the benefit of the children.

And it may be recalled that the principles laid down in the Guardianship of Infants Act, 1925, Sect. 1,⁷ extend likewise to the property of infants.

It follows from these observations that, without having obtained an order of the English Court, it is not possible to predict with certainty whether in a particular case the foreign guardian is entitled to accept

¹ E.g., a guardian by nature and nurture (the father or the mother), or a guardian by custom of the City of London; Eversley, *Domestic Relations*, 5th ed., 1937, p. 527.

Gambier v. Gambier (1835), 7 Sim. 263.

² *Johnstone v. Beattie* (1843), 10 Cl. & F. 40, 87.

³ *Mackie v. Darling* (1871), L.R. 12 Eq. 319; *In re Crichton's Trust* (1855), 24 L.T. (O.S.) 267; *Brown v. Collins*, [1883] 25 Ch. D. 56; *In re Ferguson's Trusts* (1874), W.R. 762 (Irish case).

⁵ *In re Hellmann's Will* (1866), L.R. 2 Eq. 363; *In re Chatard's Settlement*, [1899] 1 Ch. 712.

⁶ *In re Chatard's Settlement*, *supra*.

⁷ *Ante*, p. 286.

money due to the infant from an English debtor. It is sometimes maintained¹ that, if money is not paid into court, payment by the debtor to a foreign guardian would be recognised as a valid discharge of the debt. This statement is, however, not supported by authority.

¹ Cheshire, 3rd ed., p. 539 ; Kekewich, J., *obiter*, in *In re Chatard's Settlement*, *supra*, at p. 716.

CHAPTER XII

THE STATUS OF MARRIAGE

I. GENERAL PRINCIPLES

The most important of all relationships of status is the relationship between husband and wife: the status of marriage. The legal duty to comfort and maintain the consort, the criminal responsibility of the bigamist, the liability, in tort, of the enticer of the wife, normally the legitimacy of the children of the marriage—these and other consequences depend on the existence of a valid marriage between the parties.

The rules of the English conflict of laws on the conclusion and dissolution of a marriage containing a foreign element are based on the notion of marriage as a personal status. An analysis of this notion would seem desirable before we proceed to explain those rules.

1. MONOGAMOUS AND POLYGAMOUS MARRIAGES.

A. The conception of the Christian marriage. English law does not recognise as marriage every type of union between a man and a woman. This term denotes only a connection which, in the words of Lord Penzance,¹ is a "voluntary union for life of one man and one woman to the exclusion of all others." A union of this type is for reasons of convenience² briefly called a Christian marriage. Neither polygamous nor time-limited unions comply with the characteristics of the Christian marriage. It will be remembered that the characterisation of a union as a Christian marriage depends upon the law prevailing at the place where the union is solemnised (*lex loci celebrationis*).³

Since the characteristics of marriage are the same throughout Christendom, all marriages solemnised in the lawfully admitted form in the countries of western civilisation satisfy the requirements of the Christian marriage. Moreover, the notion of the Christian marriage has become dissociated from its original religious significance and is given, in modern English law, an extended meaning. It is applied not only with respect to unions of parties professing the Christian faith, but also to duly solemnised unions of persons who are not

¹ In *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130, 133; see also *per* Lord Brougham in *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 532, and Sir Edward Simpson in *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395, 417.

² Lord Reading, C.J., in *R. v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634, 640.

³ *Ante*, p. 36.

members of an established Church, of Jews¹ and even of persons who are domiciled in a country permitting polygamy. Thus, if a Mohammedan who is domiciled in Pakistan—and whose *lex domicilii* permits polygamy—contracts, whilst on a visit to England, a marriage before a Registrar of Marriages, his marriage would satisfy the requirements of the Christian marriage.² Further, this conception extends to monogamous unions which are unlimited in time even if concluded in a non-Christian country; it has been held that the test of the Christian marriage is satisfied by a union solemnised in Japan according to local rites,³ and even by a Hindu union celebrated according to the rites of a Hindu sect acknowledging the tenets of monogamy.⁴

From the doctrine of the Christian marriage important consequences flow. A marriage concluded abroad which satisfies this test, is recognised by the English courts, in all respects, as a marriage, and, on principle, is treated in the same manner as if it were concluded in the English jurisdiction. In particular, it can be dissolved by the English courts if the conditions upon which they exercise their jurisdiction⁵ have been satisfied.

B. The effect of polygamous marriages. It has been seen that not every marriage celebrated in a foreign country admitting polygamous practices is, in the English courts, regarded as polygamous, but that such a marriage, if avowedly monogamous, is treated like a Christian marriage. There are, however, marriages which, being plainly polygamous in intent and character are valid by the law of the foreign country where the parties thereto are domiciled and the marriage is celebrated. Hereunder fall numerous Hindu and Moslem marriages contracted in India and Pakistan.

Even such marriages are not devoid of effect in the English jurisdiction. The English courts recognise the status of marriage created by the competent foreign law although the mutual rights and obligations of the spouses differ essentially from those of the parties to a Christian marriage. Lord Greene, M.R., said in *Baindail v. Baindail*,⁶ where it was held that the polygamous marriage of a Hindu in India was an effective bar to his subsequent marriage in England before the Registrar—

¹ Quakers and Jews Marriages Validation Act, 1847.

² *R. v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin*, *supra*.

³ *Brinkley v. A.G.* (1890), L.R. 15 P.D. 76; p. 37, *ante*.

⁴ *In Lord Sinha's Claim, H.L. Jour.*, 1939, Vol. 171, 350; *Mehta v. Mehta*, [1945] 2 All E.R. 690.

⁵ See pp. 314, *seq.*, *post*.

⁶ [1946] P. 122, at p. 127; see also *Srini Vasam v. Srini Vasam*, [1946] P. 67.

By the law of the appellant's domicil at the time of his Hindu marriage he unquestionably acquired the status of a married man according to Hindu law; he was married for all purposes of Hindu law, and he has imposed upon him the rights and obligations which that status confers under that law. That status he never lost. Nothing that happened afterwards, save the dissolution of the marriage, if it be possible according to Hindu law, could deprive him of the status of a married man which he acquired under Hindu law at the time of his Hindu marriage.

Consequently, if a person who contracted a valid polygamous marriage abroad, subsequently goes through a marriage ceremony in the English form in England, the second "marriage" will be declared null and void by the courts¹ although the perpetrator might not be punishable, in criminal law, for bigamy.² But though a polygamous marriage is capable of endowing the parties with the status of married persons, it cannot form the subject matter of a "matrimonial cause" in the English courts and, in particular, cannot be dissolved by them because their proceedings are only adapted to deal with Christian marriages.³

The children of polygamous marriages are in certain cases regarded as legitimate. This result does not, however, depend on the characterisation of the marriage of their parents in English law; they acquire the status of legitimacy under their own *lex domicilii*.⁴

2. THE AGREEMENT TO MARRY AND THE STATUS OF MARRIAGE.

Not every union satisfying the test of a Christian marriage produces the legal effect of marriage. The union must not only be a marriage, it must be a marriage valid in law. Our next question is, therefore, what constitutes a valid marriage? The answer is: a valid marriage has two constituents, first, a valid agreement of the intending spouses to marry, and, secondly, the attribution of the status of marriage to the agreement of the parties by the competent State. In the words of Professor Beale⁵—

the law of every Common Law state, and indeed of every European and American state, deals with marriage as a voluntary union of a man and a woman. This involves two steps: first, a valid agreement of the man and woman to live together as man and wife, which creates a relation between them; and second, the legalising of this relation by act of law which thus changes it into a status.

This statement is in harmony with the views expressed by the English

¹ [1946] P. 122, at p. 130; see also *Srini Vasan v. Srini Vasan*, [1946] P. 67.

² *R. v. Naguib*, [1917] 1 K.B. 359.

³ *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130; *Mehta v. Mehta*, [1945] 2 All E.R. 690.

⁴ See pp. 277-8, *ante*.

⁵ 2 Beale, 668.

judicial authorities, as will be seen from Sir James Hannen's observations in *Sottomayor v. De Barros*,¹ that marriage is

based upon the contract of the parties, but it is a status arising out of a contract to which each country is entitled to attach its own conditions, both as to its creation and duration.

The two constituents of a marriage are not governed by the same law. The agreement of the parties must, in all respects, conform with the law of the place where the marriage is solemnised (*lex celebrationis*); the marriage status, however, is super-added, on principle, by the same law which generally determines the personal status of a person, i.e. the *lex domicilii*.

If, therefore, the agreement of marriage is invalid according to the *lex celebrationis*, the first essential of a valid marriage is absent and no question can arise with respect to the recognition of the validity of the marriage by the *lex domicilii*. This has been clearly expressed by the Judicial Committee in *Berthiaume v. Dastous* ²—

If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere although the ceremony or proceeding if conducted in the place of the parties' domicil would be considered a good marriage.

If, on the other hand, the agreement of the parties to marry is unobjectionable under its *lex celebrationis*, the marriage may still be invalid because the *lex domicilii* might withhold the status of marriage from the agreement. "Since the domestic status of marriage is governed, like all domestic status, by the law of the domicil or domicils of the parties, it is that law which ultimately creates the marriage status." ³

The first of the constituents does not offer any real difficulty. It is usually easy to ascertain whether the agreement to marry is valid by its *lex celebrationis*, or whether it is invalid under that law, e.g. for lack of capacity of one or both parties, or because it does not satisfy the prescribed form or infringes some prohibition. The legal problems pertaining to the conflict of laws concern almost exclusively the second constituent, i.e. the question whether and upon what conditions the *lex domicilii* attributes the status of marriage to the agreement of the parties. The following observations on the validity of the marriage presuppose, therefore, the existence of an agreement to marry that is valid under its *lex celebrationis*, and deal—unless

¹ (1879), 5 P.D. 94, 101; see further *per* Lord Haldane in *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, 653; see p. 321, *post*.

² [1930] A.C. 79, 83; *Robert v. Robert*, (1947), 63 T.L.R. 343.

³ *American Restatement*, Para. 121, comment d.

stated otherwise—with the attribution of the marriage status by the *lex domicilii*.

3. WHICH LAW OF DOMICIL ATTRIBUTES THE STATUS OF MARRIAGE ?

If, prior to the conclusion of the marriage, the parties thereto are domiciled in different countries, the question arises *which* law of domicile is competent to attribute the status of marriage to their agreement.* This problem is of great practical importance if the future wife is incapable of contracting marriage by her own *lex domicilii*, but possesses full capacity to do so under the *lex domicilii* of the prospective husband. If, in these cases, the status of marriage is attributed by the *lex domicilii* of the prospective husband, the marriage would be valid, but, if both *leges domicilii* of the prospective spouses must concurrently enable the parties to conclude the marriage, the marriage would be invalid.

The problem which confronts us here is one of great perplexity. It is evidently desirable that one *lex domicilii*—and that can only be that of the prospective husband—should determine the attribution of the marriage status in order to avoid the unsatisfactory result that the same marriage might be regarded by the law of the husband as valid, but by that of the wife as void. However, both on principle and authority, it is difficult to accept this as a general rule admitting no exceptions.

The doctrine of the matrimonial domicile, whereunder the domicile of the wife is by operation of law dependent on that of the husband,¹ does not afford a solution to our problem. The test of the matrimonial domicile is applicable where the existence of a valid marriage is beyond dispute and only the consequences of such marriage are at issue. The matrimonial domicile determines, e.g., the law governing the divorce of persons validly married, but to apply this test to the problem of whether there exists a valid marriage at all, seems, in the words of Sir Henry Duke,² to beg the question, inasmuch as "the mere fact that a ceremony was gone through would not change the domicile of the wife, and she would not, therefore, necessarily have the same domicile as her intended husband." ³

* For further reading : The judgment of Lord Greene, M.R., in *De Reneville v. De Reneville*, (1948), 64 T.L.R. 82, 83; also R. H. Graveson, "Matrimonial Domicil and the Contract of Marriage," in *Journ. of Comp. Leg.*, 1938, Third Series, Vol. 20, p. 55; M. Schmitthoff, "Validity of Marriage and the Conflict of Laws," 56 *L.Q.R.* (1940), 514.

¹ See p. 85, *ante*.

² In *Mitford v. Mitford*, [1923] P. 130, 139; see also James, J., in *Niboyet v. Niboyet* (1878), 4 P.D. 1, 9.

³ *Ogden v. Ogden*, [1908] P. 46, at p. 78.

Fortunately, a solution is provided in most cases by the fact that the intended wife takes up residence with the intended husband in the country of his domicile in order to cohabit with him. By declaring her intention to marry and by subsequently residing at the domicile of the husband, the female partner has abandoned her previous domicile and acquired, *animo et facto*, a domicile of choice that coincides with the domicile of the intended husband. This has been made clear by Sir James Hannen, P., in *Turner v. Thompson* ¹—

A woman when she marries a man not only by construction of law, but absolutely as a matter of fact, does acquire the domicile of her husband if she lives with him in the country of his domicile.

It is the new, and not the prior domicile of the intended wife which determines her capacity to marry; it would, as Professor Cheshire has pointed out, be erroneous to ascribe to the domicile of each party *before* the marriage the power of determining the validity of the intended marriage. The view that, in these cases, the *lex domicilii* of the husband alone determines the validity of the marriage is supported by the following considerations. The parties, when concluding the marriage, intend normally to reside at the place where the husband has his permanent home, which, in law, is termed his domicile. The community of that place is more concerned that the marriage of the parties should conform with the moral standards and general ideas prevailing there than the community which the wife is about to leave; the law of the husband's domicile has, therefore, a superior claim to attribute status to the agreement of the parties. This view has been expressed by Lord Brougham in *Warrender v. Warrender* ² as follows—

A connection formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word, their domicile.

In the rare cases, where the prospective wife, upon conclusion of the marriage agreement, has not in fact abandoned her previous domicile, but continues to have a different *de facto* domicile from that of

¹ (1888), 13 P.D. 37, 41; *Mitford v. Mitford*, [1923] P. 130, 139; *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 662, 663; *De Reneville v. De Reneville*, [1947] P. 168, 173, and (C.A.) (1948), 64 T.L.R. 82. It should, however, be noticed that these four cases are concerned with the *jurisdiction* of the courts to dissolve a marriage, and not with the *capacity* of intended spouses to marry.

² (1835), 2 Cl. & F. 488, 546; *Brook v. Brook* (1861), 9 H.L. Cas. 193, 205, 213; *Mette v. Mette* (1859), 1 Sw. & Tr. 416.

her husband, the conclusion appears inescapable that the marriage status must be attributed by both *leges domicilii* of the spouses, and that a marriage invalid by either *lex domicilii* is absolutely invalid.¹ Fortunately, this unsatisfactory rule applies only to exceptional cases, and even then its operation is further restricted by another principle, i.e. that, if the validity of the marriage is contested in the courts of the country where the marriage has been solemnised, the courts will in all circumstances uphold the marriage provided it is valid by their own law. The effect of this principle, which will be explained later,² is that if a woman, domiciled in England, married *in England* a man domiciled abroad, and the man, by the law of his domicil, is under incapacity to marry the woman, e.g. for reasons of affinity, the *English* courts will yet consider the marriage as valid, if no incapacity as regards the man existed under English law.³ Consequently, in practice, few cases fall under the mischief of the unsatisfactory rule which has just been discussed.

In the result, at least in the normal cases where the intended wife adopts in fact the domicil of the intended husband, the *lex domicilii* of the latter alone is competent to create the status of marriage. Once this status has been validly created, the matrimonial domicil attaches, i.e. the domicil of the wife depends, by operation of the law, on that of the husband. The law of the matrimonial domicil determines the subsequent fate of the marriage, and in particular its dissolution. Any new domicil which the husband may acquire during the marriage becomes automatically the matrimonial domicil. This means that, in case of a subsequent change of the domicil of the husband, the dissolution of the marriage status is governed by a different *lex domicilii* from that determining the creation of that status.⁴

II. THE CONCLUSION OF THE MARRIAGE

We have now to examine the conflictual rules governing the creation of the marriage status.

No problem pertaining to the conflict of laws arises if the marriage is celebrated at the place where the parties are domiciled; for then it is obvious that the law prevailing at that place attributes the status of marriage to the agreement of the parties. If, however, the marriage is celebrated at a place different from that of the domicil of the parties,

¹ *White v. White*, [1937] P. 111; *Re Paine*, [1940] 1 Ch. 46; Westlake, 7th ed., p. 57, s. 21; Foote, 5th ed., 125.

² See pp. 298, 308, *post*.

³ *Sottomayor v. De Barros* (No. 2) (1879), 5 P.D. 94; *Ogden v. Ogden*, [1908] P. 46.

⁴ *Nachimson v. Nachimson*, [1930] P. 217; see p. 38, *ante*.

conflictual questions of great importance are likely to arise, and it may fall to the courts of the country where the marriage was celebrated, or to other courts, to investigate the validity of the marriage.

The principle, that the *lex domicilii* determines the creation of the marriage status, is fully accepted by the English courts with respect to marriages celebrated outside the English jurisdiction. If, however, the marriage is celebrated within the English jurisdiction, an exception is admitted to that principle; here the overriding rule applies that the courts have to uphold, for reasons of general policy, a marriage duly solemnised and valid by their own law, whatever the attitude of the foreign *lex domicilii* may be.

It is intended to treat first the normal, and then the exceptional, alternative.

1. THE VALIDITY OF MARRIAGES CELEBRATED OUTSIDE ENGLAND.

In the case of marriages celebrated abroad the English courts, in accordance with principle, consider the validity of the marriage status as determined by the *lex domicilii* of the parties.

If, e.g. two persons domiciled in England go to Scotland and marry there, it is for English law to determine whether their agreement results in a valid marriage.¹

If, further, two persons domiciled in France go to Italy and marry there, French law would be regarded by the English courts as competent to decide on the validity of the marriage.

The statement, however, that in these cases the existence of the status of marriage is determined by the *lex domicilii*, does not imply that the validity of the marriage status is, in all respects, tested solely by that law. The *lex domicilii* may—and does—relegate to other legal systems² the determination of incidents not affecting the essential interests of the community which that law has primarily to protect. Such other legal systems are then applied by leave and licence of the *lex domicilii* which is at liberty to change the arrangement of the reserved and the relegated incidents at any time, a power exercised in harmony with the constant reassessment of social values by the community of domicil. These general observations will be clarified presently.

A. The rules governing the validity of such marriages. English

¹ But the converse case of the marriage in London of two persons domiciled in Scotland falls under the exception (*post*, p. 305) and not under the principal rule.

² Lord Brougham in the *Sussex Peerage Case* (1844), 11 Cl. & F. 85, 151.

law has developed two rules for the determination of the validity of a marriage¹ celebrated outside the jurisdiction.

Such marriages are valid if

the incidents pertaining to the form of the marriage satisfy the *lex celebrationis*, and, further, if

the incidents pertaining to the essentials of the marriage satisfy the *lex domicilii*.

These rules have been stated by Lord Campbell in *Brook v. Brook*²—

While the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicil, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicil, and it is declared void by that law, it is regarded as void in the country of domicil, though not contrary to the law of the country in which it was celebrated.

The reason why the determination of formalities is delegated to the *lex celebrationis* is provided by the doctrine of the Christian marriage.³ Under that doctrine the characteristics of marriage are the same in all countries of Christian civilisation, and consequently, a marriage validly celebrated in one of these countries should be valid everywhere. The doctrine of the Christian marriage, if carried to its logical conclusion, would demand that not only the formalities but also the essentials of the marriage should be determined by the *lex celebrationis*. This view was indeed expressed by Story who observed in 1834:⁴

The general principle certainly is that . . . marriage is to be decided by the law of the place where it is celebrated. If valid there it is valid everywhere. It has a legal ubiquity of obligation.

This view is still prevalent in the American conflict of laws.⁵ English law, on the other hand, does not accept the strictly logical conclusions of the doctrine of the Christian marriage, but, since 1861,⁶ attaches more weight to the status character of the marriage, with the consequence that the *lex domicilii* is regarded as the superior law which has

¹ "Marriage" means here always marriage status, the second of the constituents discussed above at p. 290.

² (1861), 9 H.L. Cas. 193, 207; Lord Greene, M.R., in *De Reneville v. De Reneville* (1948), 64 T.L.R. 82, 85-96. ³ P. 289, ante.

⁴ S. 121.

⁵ *Réstatement*, s. 121; 2 Beale, 669.

⁶ Since *Brook v. Brook* (1861), 9 H.L. Cas. 193.

the power of reserving to itself the regulation of the essentials of the marriage. Since, according to the English doctrine, the *lex celebrationis* applies only by delegation from the *lex domicilii*, the latter law is solely competent to prescribe which incidents shall pertain to the formalities and which to the essentials of marriage.

The distinction drawn by English law between the formalities and the essentials of the marriage makes it imperative to define precisely these two legal terms. This has been lucidly done by Foote¹ in the following passage—

The difference between essentials and forms in such a matter would naturally seem to be that between prohibitions which forbid and prohibitory directions which merely impede the marriage.

In short, prohibitions, which, according to the *lex domicilii*, render the marriage absolutely void (absolute prohibitions), form part of the essentials, whilst prohibitions, which can be surmounted by the consent of some person² or which otherwise do not invalidate a marriage concluded in violation of them (directory prohibitions), pertain to the formalities of the marriage.

An example of this distinction occurs in two classical provisions of the French Civil Code both of which have been examined in the English courts.³

Article 148 provides⁴ that the son who has not attained the age of 25 years and the daughter who has not attained the age of 21 years cannot marry without the consent of their parents.

Article 151 provides⁵ that when children have attained majority, they still have formally to ask for the permission of their parents to marry, but the refusal of the parents only delays the marriage for some months.

The first of these prohibitions is in the nature of an absolute, the second one in the nature of a directory, prohibition.

B. The application of these principles. Proceeding now to apply these rules to the incidents of a marriage solemnised outside England, it is proposed to deal first with the capacity of the parties to marry.

(a) TO THE CAPACITY OF THE PARTIES TO MARRY. Whereas, in

¹ 5th ed., 123.

² See W. E. Beckett, "Classification in Private International Law," 15 *B.Y.B.I.L.* (1934), 46, 80.

³ The first of these prohibitions has been discussed in *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; the other one in *Ogden v. Ogden*, [1908] P. 46; in both cases the marriage had been solemnised in England, and the cases fell, therefore, under the exceptional alternative (see *post*, p. 308).

⁴ Altered by the Act of 17th July, 1927.

⁵ Altered by the Act of 7th February, 1924.

other branches of the law, it is customary to approach the incident of capacity under its positive aspect, e.g. whether the parties are *capable* of concluding a contract, of entering into a conveyance or of making a will, it is more convenient, for the purposes of the conflict of laws, to regard the capacity to marry under its negative aspect and to determine in which cases a person is *incapable* of contracting a marriage. Foote observes in this connection¹ that capacity

signifies that the person whose capacity is under consideration is not the subject of any of the prohibitions or deprivations of the laws which actually govern him and his actions.

When looked at from this angle, the problem of the capacity of a person to marry is clearly only an instance of the broader problem of prohibitions against marriage in general. Consequently, if a prohibition incapacitating a person for marriage has a directory character, the rules relating to the formalities of the marriage must be applicable, whereas, if the prohibition has absolute effect, the law determining the essential validity of the marriage governs the capacity to marry. This differentiation accounts for a frequently recurring statement concerning incapacitating prohibitions of a directory character, i.e. that

the consents of, and the notices to, parents or others, necessary by many laws to the validity of a marriage, are considered as part of the form or ceremony of the marriage.²

(b) TO THE FORMALITIES OF THE MARRIAGE.

(i) *MARRIAGES SOLEMNISED IN THE LOCAL FORM.* The formalities of the marriage which, as will be remembered, are governed by the *lex celebrationis* include all prohibitions of a directory character.

English law considers as a matter of form certain incidents, such as banns and licences, of the actual marriage ceremony, whilst the presence of an ordained priest, if the marriage is concluded in the so-called original common law form,³ is regarded as a matter of essence. Banns and licences were introduced by Lord Hardwicke's Marriage Act, 1753, in order to secure the publicity of marriages.

¹ 5th ed., p. 99; see also the observations of the C.A. in *Ogden v. Ogden*, [1908] P. 46, 74.

² Dicey, 5th ed., p. 736; see also *Sottomayor v. De Barros* (1877), 3 P.D. 1, 7; *Ogden v. Ogden*, [1908] P. 46, 74, 75; *Chetti v. Chetti*, [1909] P. 67, 81-7. It should be remembered that incapacity to marry based on personal discriminations of the foreign law, which are unknown to English law, is not recognised by English law. In particular discriminations on account of colour, class, race and religion are not recognised by English law; *Sottomayor v. De Barros* (1879), 5 P.D. 94, 104; *Chetti v. Chetti*, *supra*; see p. 63, *ante*.

³ See p. 303, *post*.

It has been said by Lord Campbell in *Brook v. Brook*¹ that the Act only regulated "the formalities by which the ceremony of marriage shall be celebrated" but did "not touch the essentials of the contract or prohibit any marriage which was before lawful." Further, the consent of parents is generally regarded by English law as a formal matter because it merely delays the marriage until the coming of age of the infant, but, in view of the language of the Age of Marriage Act, 1929, it is probable that a marriage of minors under sixteen years of age is now absolutely void. These rules of English municipal law apply, of course, only if the parties to the marriage are domiciled in England. In the case of the marriage of persons domiciled in a country other than England, the laws of that country may provide different rules.²

The rule, that the formalities of the marriage are governed by the *lex celebrationis*, has important consequences. If the *lex celebrationis* does not prescribe any solemnities at all, but recognises what is called marriages by repute, as some American States still do,³ unions concluded in those countries in such formless manner are recognised by English law as valid marriages.⁴ If, on the other hand, the *lex celebrationis* provides, as in the case of the laws of Greece or Iran, that a marriage may be celebrated by the observance of the ceremonies prescribed by the religion of the parties, the English courts would, e.g., not recognise as valid a marriage between two Protestant parties consecrated by a Roman Catholic priest according to the rites of the Roman Church.⁵ The *lex celebrationis* may, therefore, provide for solemnities which are more or less rigorous than those prescribed by English law.

An example of this rule is furnished by the interesting case of *Apt v. Apt*⁶ where the validity of a marriage by proxy concluded in the Argentine and satisfying the Argentine, but not the English formalities was upheld by the English courts.

In this case, a man who was domiciled and resident in the Argentine,

¹ (1861), 9 H.D. Cas. 193, 215, see also *Simonin v. Mallac* (1860), 2 Sw. & Tr. 65, 76.

² See, e.g., the different forms of parental consent in French law, p. 300, *ante*.

³ These marriages are, in the United States, sometimes called common law marriages; 2 Beale, 675.

⁴ *In re Green* (1909), 25 T.L.R. 222.

⁵ *Re Alison's Trusts* (1874), 31 L.T. 638.

⁶ [1947] P. 127; [1948] P. 83 C.A.; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54; see also the so-called Gretna Green cases *Crompton v. Bearcroft* (1769), 2 Hagg. Cons. 444 note; *Ilderton v. Ilderton* (1793), 2 H.Bl. 145; *Middleton v. Janverin* (1802), 2 Hagg. Cons. 437, 443. See further: *Papadopoulos v. Papadopoulos*, [1930] P. 55; *Scrimshire v. Scrimshire* (1752), 2 Hagg. Cons. 395; *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 530; *Berthiaume v. Dastous*, [1930] A.C. 79.

wrote in 1940 to a woman domiciled and resident in England and proposed marriage to her; she accepted but could not go to the Argentine owing to war restrictions. Eventually, on the advice of an Argentine lawyer, she executed a special power of attorney before a public notary by which she authorised a proxy living in Buenos Aires to contract, in her name and as her representative, a marriage in Buenos Aires with the man in question. In 1941, the marriage was duly solemnised in Buenos Aires, the woman being represented by the proxy who produced the power of attorney. At the end of the Second World War, the husband had ceased to write to the wife and did not take any steps enabling her to obtain a permit to enter the Argentine, and the wife petitioned the English court for the annulment of the marriage;¹ the husband did not defend the suit.

It was proved to the satisfaction of the Court that the law of the Argentine admitted marriages by proxy and such marriage was valid according to Argentine law. The principal issue before the Court was whether the solemnisation of the marriage by proxy was a matter of form, in which case Argentine law as the *lex celebrationis* applied and the marriage was valid, or whether it pertained to the essentials of the marriage and was, therefore, governed by English law; in this case the marriage would be invalid.

Lord Merriman, P., in a judgment affirmed by the Court of Appeal, held that "the celebration of marriage by proxy is a matter of the form of the ceremony or proceeding, and not an essential of the marriage," he further held that no principle of English public policy was infringed by the recognition of that form inasmuch as marriage by proxy was expressly recognised by the canon law and adopted in civilised countries with a long Christian tradition, such as Portugal and Spain.

(ii) *MARRIAGES SOLEMNISED IN THE ORIGINAL COMMON LAW FORM.* The rule, that a marriage must satisfy the formalities required by the law of the place where it is concluded, is not always satisfactory in its practical consequences. It may be impossible to comply with the local form, which may not be adapted to the Christian marriage, e.g. if a marriage is contemplated in a country of non-Christian or primitive civilisation, or the local form of marriage may be objectionable for conscientious reasons.² To meet these contingencies, English law provides a further alternative by recognising as valid a marriage concluded in the so-called original Common Law form. This alternative is, however, subsidiary and can only be employed if it is proved that it was impossible to comply with the local form³ (or with the form provided by the Foreign Marriage Acts, 1892-1947, which will be treated later.) Further, it is believed that this subsidiary form is only available to parties domiciled in England.⁴

The two conditions which must be satisfied if English law is to

¹ The law of the Argentine does not admit the dissolution of a marriage; see p. 319, *post*.

² Lord Stowell in *Ruding v. Smith* (1821), 2 Hagg. Cons. 371.

³ See *Kent v. Burgess* (1840), 11 Sim. 361, 376.

⁴ There is no direct authority for the view expressed in the text, but the view is in harmony with general principle.

attribute the status of marriage to a union concluded in the Common Law form, are, *apart from the indispensable requirements of a marriage agreement*, that—

- (a) it is impossible to conclude the marriage in the local form or in the form provided by the Foreign Marriages Acts, 1892–1947, and
- (b) the marriage is consecrated by an episcopally ordained priest.

The first of these conditions was explained by Sir Lancelot Shadwell¹ in the following passage—

Everyone who reads the judgment of Lord Stowell in the case of *Ruding v. Smith*² must perceive that that learned judge came to the conclusion that the marriage in that case was good, because difficulties, which he denominates insuperable, existed in effecting a marriage according to Dutch law.³ In this case, however, there were no insuperable difficulties which prevented a marriage from being had according to the Belgian law; and, therefore, there are no circumstances of exception here, which operate to take the marriage out of the general rule which requires that marriage abroad, in order to be valid, must be celebrated according to the *lex celebrationis*.

That the second condition forms, in principle, part of the Common Law, was laid down by the House of Lords in *R. v. Millis*.⁴ The officiating priest need not be a minister of the Church of England. A Roman Catholic priest is apparently capable of solemnising a valid Common Law marriage,⁵ but a priest who has not been episcopally ordained, is incapable of solemnising such a marriage.⁶ Thus, in *Catherwood v. Caslon*⁷—

Two British subjects domiciled in England went in 1834 through a marriage ceremony in Beyrouth (Syria), i.e. in a Mohammedan country. The marriage was solemnised by an American missionary in the presence of two British consuls and other persons. Since both parties were members of the Church of England, the rites of the Church were observed. The parties lived together as husband and wife, and a son was born.

It was held that the marriage was invalid because the priest solemnising it was not episcopally ordained.

If no ordained clergyman is available, as is sometimes the case at missionary stations or isolated colonial settlements,⁸ a marriage

¹ In *Kent v. Burgess* (1840), 11 Sim. 361, 376.

² (1821), 2 Hagg. Cons. 371, 391.

³ As applied to a part of South Africa then conquered by British troops.

⁴ (1844), 10 Cl. & F. 534; *Limerick v. Limerick* (1863), 32 L.J. P.M.A. 92; *Phillips v. Phillips* (1921), 38 T.L.R. 150.

⁵ *James v. James* (1881), 50 L.J. P.D.A. 24.

⁶ It is, however, believed that the priest need not be episcopally ordained if no ordination is admitted by the denomination to which the spouses belong, e.g., in the case of Baptists.

⁷ *Catherwood v. Caslon* (1844), 13 M. & W. 261.

⁸ *Wolfenden v. Wolfenden*, [1946] P. 61; *Catterall v. Catterall* (1847), 1 Rob. Ecc. 580, 581–2.

concluded by mere agreement and not solemnised by a priest in holy orders would be recognised as valid by the Common Law.¹

(iii) *MARRIAGES SOLEMNISED UNDER THE FOREIGN MARRIAGE ACTS, 1892-1947.* The rules of the Common Law under which the validity of the marriage abroad of persons domiciled in Great Britain depends in the first instance upon the observance of the local form of marriage are apt to produce inconvenience and uncertainty. For these reasons, Parliament has enacted a special form for such marriages, viz. by the Foreign Marriage Acts, 1892-1947. In practice, this statutory form is observed in most cases because it excludes, as far as English law is concerned, all doubts regarding the formal validity of the marriage.

The statutory form is available if at least one of the intending spouses is a British subject. Sect. 1 of the Act² provides that

all marriages between parties of whom one at least is a British subject solemnised in the manner in this Act provided in any foreign country or place by or before a marriage officer within the meaning of this Act shall be as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law.

Marriage officers in the meaning of the Act are British ambassadors in the countries to which they are accredited and members of the diplomatic service not below the rank of secretary who are attached to the embassy,³ British consuls in foreign countries as well as governors, high commissioners, residents or other persons holding a marriage warrant.³ The marriage must be solemnised either by the marriage officer or by another person in his presence, and the ceremony must take place at the official house of the marriage officer with open doors and in the presence of two or more witnesses.⁴ Chaplains of H.M. Forces serving in a foreign territory may solemnise a marriage if at least one of the parties to the marriage is a member of the forces serving in the territory in question.⁵

Three points should be noticed in connection with the Act. First, the Act provides, like the Wills Act, 1861, facilities additional to

¹ *Lightbody v. West* (1903), 88 L.T. 484; *Beamish v. Beamish* (1861), 9 H.L. 272, 332, 353.

² References are to the Act of 1892 unless stated otherwise. The Act of 1947 came into force on February 1, 1948 (Foreign Marriage Order in Council, 1947, Art. 1 (S.R. & O. 1947, No. 2875)).

³ Foreign Marriages Order in Council, 1913, Art. 4 (S.R. & O. 1913, No. 1270).

⁴ Foreign Marriage Act, 1892, s. 8; Foreign Marriages Order in Council, 1913, and Foreign Marriages Order in Council, 1925 (S.R. & O. No. 92).

⁵ Sect. 22 (as amended by the Act of 1947). This section applies to marriages on board H.M. Ships which are in foreign territorial waters (Sect. 22 (3)).

the rules of the Common Law, but does not restrict the validity of a marriage concluded in the local form.¹ Secondly, the Act and the Orders made thereunder disclose the tendency to avoid, as far as possible, a divergence between the statute and the local law, though a marriage satisfying the former but not the latter will be regarded as valid by the English courts.² In order to avoid such a divergence (which would be particularly unfortunate if one of the spouses were a foreign subject), the statutory form is not to be made available if, in case of a marriage to a foreigner, the marriage officer is not satisfied that the marriage will be recognised by the law of the nationality of the foreign spouse, or if he generally considers the marriage to be inconsistent with international law or the comity of nations.³ Thirdly, the Act applies not only to countries under a foreign sovereign, but also to British dominions outside the United Kingdom.⁴ Apart altogether from the Act of 1892, Parliament has frequently confirmed the validity of doubtful or invalid marriages by other public or private Acts.⁵

(iv) *MARRIAGES SOLEMNISED ON THE HIGH SEAS OR IN EMBASSIES.* Finally, some exceptional cases have to be mentioned where the *lex celebrationis* has to be ascertained by way of legal fiction. A marriage celebrated on board ship on the high seas must satisfy the formalities prescribed by the law of the country to which the ship belongs.⁶ Further, a marriage celebrated in a foreign embassy is valid if satisfying the requirements prescribed by the law of the country whose envoy the ambassador is,⁷ because the dwelling-place of an ambassador is, by the Law of Nations, extraterritorial and forms part of the country represented by the ambassador. The exact scope of this privilege is, however, not settled. It is probably confined to the case where *both* prospective spouses are nationals of the country represented by the envoy.⁸

(c) *TO THE ESSENTIALS OF THE MARRIAGE.* In the case of marriages

¹ The Act withholds its benefits from members of the Royal family intending to marry abroad (s. 11).

² *Hay v. Northcote*, [1900] 2 Ch. 262.

³ Foreign Marriage Act, 1892, s. 19; in both cases there is an appeal to a Secretary of State.

⁴ See s. 11 (2) (c).

⁵ See, e.g., The Marriages in Japan (Validity) Act, 1912.

⁶ Dicey, 5th ed., p. 740.

⁷ The reverse case of a marriage taking place in a British embassy abroad is now governed by the Foreign Marriage Act, 1892, and the Foreign Marriages Orders, 1913 and 1925.

⁸ See *Pertreis v. Tondear* (1790), 1 Hagg. Cons. 136 where the privilege was withheld from a marriage between spouses who were both nationals of a country different from the one in whose embassy the ceremony took place.

celebrated outside the English jurisdiction, the English courts refuse recognition to a marriage absolutely prohibited or declared illegal by the *lex domicilii* of the parties though the marriage may be perfectly valid according to the law of the place where it was celebrated.¹

English municipal law provides several illustrations of absolute prohibitions which avoid all contravening marriages concluded abroad by persons domiciled in the English jurisdiction.² The Royal Marriage Act, 1772, prohibits the marriage of certain members of the Royal Family without prior consent of the reigning King or Queen. It has been held that the Act has absolute effect and avoids, therefore, a marriage concluded abroad without Royal consent though the marriage satisfied the requirements of the *lex celebrationis*.³ Further, until 1907, a marriage of a widower with his deceased wife's sister,⁴ and, until 1921,⁵ the marriage of a widower with his deceased brother's wife was, by a statute passed in the reign of Henry VIII,⁶ declared as "contrary to God's law" and, by a later statute,⁷ as "absolutely null and void." It was decided in 1861 that a marriage within these then prohibited degrees by persons domiciled in England was absolutely invalid though the marriage had been concluded abroad and was unobjectionable from the point of view of the foreign *lex celebrationis*.⁸

It should be noted that, in the words of Dicey,⁹ "the validity of the marriage is in no degree affected by the fact that the object of the parties in marrying away from their country is to evade the requirements of the law of their domicil." The evasive intention of the parties is irrelevant. Only the character of the prohibition which has actually been infringed matters. As the provisions of the English Marriage Act, 1753, concerning banns and licences are only of directory character the English courts have never considered the so-called Gretna Green marriages as invalid though the couples eloping to Scotland may well have been animated by the intention of evading the publicity of the English marriage.¹⁰ In the United States, where a multitude of con-

¹ *Brook v. Brook* (1861), 9 H.L. Cas. 193; *Re de Wilton. de Wilton v. Montefiore*, [1900] 2 Ch. 481.

² The provisions of the Age of Marriage Act, 1929, have been referred to at p. 302, *ante*.

³ *The Sussex Peerage Case* (1844) 11 Cl. & F. 85.

⁴ This prohibition was abolished by the Deceased Wife's Sister's Marriage Act, 1907.

⁵ This prohibition was abolished by the Deceased Brother's Widow's Marriage Act, 1921.

⁶ (1540), 32 Hen. 8, c. 16; 32 Hen. 8, c. 38.

⁷ (1835), 5 and 6 Wil. 4, c. 54, s. 2.

⁸ *Brook v. Brook* (1861), 9 H.L. Cas. 193.

⁹ Dicey, 5th ed., p. 737.

¹⁰ *Compton v. Bearcroft* (1769), 2 Hagg. Con. 444, note, and the cases quoted above at p. 299 n. (6). No Gretna Green marriage (which, in fact, was a marriage by declaration *de presenti*) has been possible since 1st July, 1940, when the Marriage (Scotland) Act, 1939, ss. 5 and 9, came into operation (S.R. & O. 1940, No. 859).

veniently situated internal state boundaries provide similar facilities to eloping couples, some states¹ have expressly attached absolute effect to statutory prohibitions of evasive marriages of their domiciliaries.

2. THE VALIDITY OF MARRIAGES CELEBRATED IN ENGLAND.

We proceed now to an examination of marriages celebrated in England by persons domiciled elsewhere. On principle, the status of marriage is attributed here, as in all other cases, by the *lex domicilii* exclusively. If this principle were applied without qualification, the English courts would have to regard marriages celebrated in England and perfectly valid by English law as invalid if contravening absolute prohibitions of the foreign *lex domicilii*. This result would hardly be reconcilable with the duty of the English courts to protect the legal and social institutions of this country in preference to the enforcement of foreign vested rights, and, in order to avoid such a result, the ultimate reservation in favour of the general policy of the *lex fori* is employed. The principle of the *lex domicilii* is, therefore, qualified by an exception which can be formulated as follows—

The English courts will uphold the validity of a marriage duly celebrated in their own jurisdiction and valid according to their own municipal law, notwithstanding the fact that the marriage might infringe absolute prohibitions of the foreign *lex domicilii*.

This exception is the outcome of three decisions which are in harmony if approached from the point of view adopted here, but which appear to conflict if interpreted differently, i.e. *Simonin v. Mallac*,² *Sottomayor v. De Barros*,³ and *Ogden v. Ogden*.⁴

In *Simonin v. Mallac*¹ two persons of full age, domiciled in France, went through a marriage ceremony in England and returned to France on the day following the solemnisation of the marriage.

The marriage was valid according to English law (*lex celebrationis* and *lex fori*), but the parties had not obtained the consent of their parents as prescribed by Article 151 of the Code Civil,⁵ and a French court had declared the marriage to be null and void.

Upon the petition of the wife, the English Court for Divorce and Matrimonial Causes decided that the marriage was valid, at the same time expressing regret for the unavoidable result that the validity of the marriage was differently adjudicated upon by English and French law.

The reasons of the Court are indicated in the following passage:

“France may make laws for her own subjects, and impose on them all the consequences, good or evil, that result from those laws; but

¹ E.g. Wisconsin, Louisiana, Massachusetts, West Virginia; ² Beale, 681-3.

³ (1860), 29 L.J. P.M. & A. 97.

⁴ (1877), 2 P.D. 81; 3 P.D. 1; (1879), 5 P.D. 94.

⁵ [1908] P. 46.

⁶ See p. 300, *ante*.

England also may make laws for the regulation of all matters within her own territory. Either nation may refuse to surrender its own laws to those of the other, and if either is guilty of any breach of the *comitas* or *jus gentium*, that reproach should attach to the nation whose laws are least calculated to ensure the common benefit and advantage of all."

It is disputed whether in *Simonin v. Mallac*¹ English law was applied in the quality of the *lex celebrationis* or of the *lex fori*. It has been said by high authority² that English law has been chosen in application of the general principle that the determination of the formalities of the marriage is delegated to the *lex celebrationis*. The view, however, that English law has, in fact, been applied by virtue of the ultimate reservation in favour of the general policy of the *lex fori*, appears not only to follow from the reasoning of the Court in that case, but is also supported by the decision of the Court of Appeal in *Ogden v. Ogden*.³

In this case, M. Philips, a minor, domiciled in France, went through a marriage ceremony in England with Miss Williams who was domiciled in England; but shortly afterwards the husband returned to France.

The marriage was valid according to English law (*lex celebrationis* and *lex fori*) but absolutely void by French law (*lex domicilii*) for want of the parental consent prescribed by Article 148. of the Civil Code,⁴ and a French Court had decreed the nullity of the marriage of the parties.

Subsequently, M. Philips married a French woman in France, and Miss Williams petitioned the English Court for a divorce on the ground of his adultery and desertion, but her petition was dismissed for want of jurisdiction. Later Miss Williams married Mr. Ogden and lived with him for some time. Mr. Ogden then instituted proceedings asking the Court for a decree of nullity for the reason that, when she married him, she was still lawfully married to Mr. Philips.

The Court of Appeal held that the validity of the marriage between a domiciled Frenchman and a domiciled Englishwoman, celebrated in England, was governed by English law, and that its validity was not affected by the personal incapacity of the husband, under the law of his domicile. Judgment was, therefore, given in favour of Mr. Ogden.

The facts in *Ogden v. Ogden*³ are, in many respects, similar to those in *Simonin v. Mallac*.¹ Whilst, however, in *Simonin v. Mallac*,¹ the prohibitions of French law pertained merely to the formalities, which were regulated, in any case, by English law as the *lex celebrationis*, in *Ogden v. Ogden*,³ the prohibition of French law concerned the essentials of the marriage; if, therefore, the general principle had been applicable, the marriage between M. Phillips and Miss Williams would have been invalid since it infringed the absolute prohibition of the *lex domicilii* and the Court should have given an opposite decision. The attitude

¹ (1860), 29 L.J. P.M. & A. 97.

² Lord Campbell in *Brook v. Brook* (1861), 9 H.L. Cas. 193, 218.

³ [1908] P. 46.

⁴ See p. 300, *ante*.

adopted by the Court of Appeal in *Ogden v. Ogden*¹ is only explicable if one accepts the view that, in this case, as well as in *Simonin v. Mallac*,² English law was applied as the *lex fori* and not as the *lex celebrationis*, inasmuch as the Court of Appeal in *Ogden v. Ogden*¹ (as Dicey³ rightly observes) intended to approve of and follow *Simonin v. Mallac*.⁴

The view, that the English courts will in all circumstances uphold the validity of marriages celebrated within the jurisdiction and valid by their own municipal law, is further supported by *Sottomayor v. De Barros (No. 2)*.⁵ In this case a marriage celebrated in England by first cousins, one of them domiciled in England, the other in Portugal, was held valid, though, by the law of Portugal, marriages between first cousins were absolutely void. In the final judgment,⁶ Lord Hannen expressly rejected the view that *Simonin v. Mallac*⁴ was based on the distinction between the formalities and the essentials of the marriage. Lord Hannen apparently considered the incapacity of the Portuguese party to marry as a kind of personal discrimination like those based on colour or religion,⁷ but his decision is also reconcilable with the broader view that an English court will not reject as invalid a marriage celebrated in England and valid by English law.

Unfortunately, in *Ogden v. Ogden* as well as in *Sottomayor v. De Barros*, one of the parties was domiciled in England and the other abroad. This has given rise to the view that the English courts will apply the ultimate reservation of the *lex fori* only if one of the parties is domiciled in England—a view which is not without judicial support (see certain *dicta* in the unsatisfactory decision of the Court of Appeal in *Sottomayor v. De Barros (No. 1)*.⁸ This theory is rightly criticised by Professor Cheshire⁹ as “an indefensible method of reconciling the authorities.” However, the solution does not lie, as Professor Cheshire assumes, in an unrestricted recognition of the principle of the *lex domicilii*, but, conversely, in a wider application of the exception of the *lex fori*. Since foreign courts will, within their jurisdiction, undoubtedly assert their own public policy—and hardly to a smaller extent than the English courts—it cannot be said that the exception

¹ [1908] P. 46.

² (1860), 29 L.J. P.M. & A. 97.

³ Dicey, 5th ed., p. 906.

⁴ (1860), 29 L.J. P.M. & A. 97. *Galene v. Galene*, [1939] P. 237, where no reasons were given for the decision, and *De Massa v. De Massa*, [1939] 2 All E.R. 150, where the reasons given were very scanty, can hardly be reconciled with *Simonin v. Mallac* and *Ogden v. Ogden*.

⁵ (1879), 5 P.D. 94.

⁶ (1879), 5 P.D. 94, 102.

⁷ See *ante* at p. 63.

⁸ (1877), 63 P.D. 1; the decision has been criticised by the Court of Appeal in *Ogden v. Ogden*, [1908] P. 46, 74, and 2 Beale, 673.

⁹ Cheshire, 3rd ed., p. 285.

represents an undue privilege of the English jurisdiction. It is regrettable that the application of the exception in favour of the *lex fori* may sometimes add to the number of marriages valid in some countries and invalid in others, but it is believed that this "scandal"¹ can only be remedied effectively by international conventions continuing and extending the work begun by the Hague Convention on the Validity of Marriages of 1902.²

III. THE DISSOLUTION OF THE MARRIAGE

1. GENERAL OBSERVATIONS.

We have now to investigate the remedies available for the dissolution of a marriage or for the regulation of the effect of the marriage during the period of its subsistence.* Legal proceedings instituted with a view to obtaining these remedies are called matrimonial causes, and the relief available in these proceedings are the decrees of divorce, nullity, judicial separation and restitution of conjugal rights.³

It should be noted that these decrees deal with substantially different aspects of the marriage status. Divorce is the antithesis of marriage. By divorce the State abrogates the status which it had attributed to the connection of the parties by recognising that connection as a valid marriage. In England, the nature of divorce as an act of State is clearly perceptible because, until 1857, a divorce could be obtained only by a private Act of Parliament, and only since that date has the power to grant a divorce been vested by general statute in the courts, first in the Court for Divorce and Matrimonial Causes⁴ and, since 1875, in the Probate, Divorce and Admiralty Division of the High Court.⁵ A decree of nullity of marriage declares, in the first instance, that a valid marriage never existed between the parties; but the declaratory character of this pronouncement should not mislead us into thinking that this decree does not affect the status of

* For further reading : H. C. Gutteridge, "Conflicts of Jurisdiction, in Matrimonial Suits," in 19 *B.Y.B.I.L.* (1938), p. 19.

¹ Lord Penzance in *Wilson v. Wilson* (1872), L.R. 2 P. & D. 435, 442.

² Neither Great Britain nor the United States of America are parties to the Convention; see on the Convention, H. C. Gutteridge, "Conflicts of Jurisdiction in Matrimonial Suits," in 19 *B.Y.B.I.L.* (1938), 19; Westlake, 7th ed., p. 53.

³ In addition a decree of jactitation of marriage can be obtained. This relief can be claimed if the defendant falsely asserts that he is married to another person. The relief claimed is a decree of perpetual silence. The jurisdiction of the English courts is based on residence of the defendant in England. The remedy is rarely employed nowadays (Halsbury's *Laws of England* (Hailsham ed.), Vol. X, tit. *Divorce*, p. 638, and *Spivack v. Spivack* (1930), 99 L.J. P.D.A. 52, 59.)

⁴ By the Matrimonial Causes Act, 1857.

⁵ By the Supreme Court of Judicature Act, 1873.

marriage. On the contrary, it has been observed by Lord Dunedin in *Salvesen v. Administrator of Austrian Property*¹ that a decree of nullity changes the personal status of the parties like a decree of divorce, though, of course, the former has retrospective effect, but not the latter. Lord Dunedin observes in this connection—

They say that in an action of divorce you have to do with a *res*, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and therefore no *res*. Now it seems to me that celibacy is just as much a status as marriage. . . . The judgment in a nullity case decrees either a status of marriage or a status of celibacy.

Decrees of judicial separation and restitution of conjugal rights do not directly change the status of the parties and are, therefore, in some respects, subject to different considerations from those governing divorce or nullity decrees, but they nevertheless have an indirect effect on the marriage status. This is particularly true with respect to decrees for the restitution of conjugal rights which, in the words of Hill, J.,² "can only be made upon the finding of status—namely that the husband and wife were and are lawful husband and wife." For this reason a party having obtained a decree for restitution of conjugal rights is stopped from asking later for a nullity decree.²

The fact that decrees of divorce and nullity alter the personal status of the parties invests these remedies with their particular character. These decrees regulate the position of the parties not merely *inter se*, but in relation to the community to which they belong and, moreover, in relation to the whole world, since a decision of the competent court, that parties are or are not married, should, at least in principle, be respected all over the civilised world. In view of the absolute effect which decrees of divorce and nullity produce, these decrees are regarded as judgments *in rem*, or more precisely as judgments "savouring" of *res*. Lord Dunedin commented, in *Salvesen v. Administrator of Austrian Property*,³ on this aspect of divorce and nullity decrees—

All are agreed that a judgment of divorce is a judgment *in rem*. . . . The first remark to be made is that neither marriage nor the status of marriage is, in the strict sense of the word, a "*res*" as that word is used when we speak of a judgment *in rem*. A *res* is a tangible thing within the jurisdiction of the Court, such as a ship or other

¹ [1927] A.C. 641, 662; see also *per* Lord Haldane at pp. 654-5. *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, 526-7; *Armistage v. Armistage*, [1898] P. 178, 188-9.

² *Woodland v. Woodland*, [1928] P. 169, 172.

³ [1927] A.C. 641, 662; see also *per* Brett, L.J., in *Niboyet v. Niboyet* (1878), 4 P.D. 1, 12, and *Bater v. Bater*, [1906] P. 209.

chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a *res*, but it, to borrow a phrase, savours of a *res*, and has all along been treated as such. . . . I am . . . of opinion that a decree of nullity savours of a *res* just as much as a decree of divorce.

A consequence of this quality of divorce and nullity decrees is that the English courts will generally recognise the decision of the competent foreign court as final even if it has been obtained by fraudulent concealment of facts.¹

More will be said about judgments *in rem* later when the jurisdiction of the English and foreign courts will be reviewed.² Here it may be recalled that we have dealt with another type of these judgments earlier when examining the jurisdiction over foreign immovables.³ There it was seen that, as far as questions of title and possession are concerned, the courts of the *situs* have exclusive jurisdiction. That revealed a tendency to leave jurisdiction in suits *in rem* to the courts of the country whose substantive law governs the issue because they administer the substantive law as their municipal law and are, therefore, best fitted to pronounce judgments with absolute effect. The same parallelism between the law applicable and the jurisdiction can be observed regarding the kind of judgments *in rem* which is here under examination. It will be seen that, in general, in divorce and nullity suits, the courts of the country whose law governs the issue are competent to entertain the suit. The close connection between choice of law and jurisdiction makes it necessary to extend, here too, the present investigation of the law applicable to the rules governing the jurisdiction of the courts.

2. DIVORCE PETITIONS.*

The principles underlying the conflict of laws relating to divorce are thus stated by Professor Beale ⁴—

The granting of a divorce is not punishment of an offence nor the setting aside by judicial process of a contract for a cause or condition in the contract. It is nothing but the regulation by the domiciliary state of the domestic affairs of its domiciliaries, and a state of domicile is alone concerned, therefore, in the granting or refusing to grant a divorce.

The principle of the *lex domicilii* governs both the jurisdiction of the

* For further reading: G. C. Cheshire, "The International Validity of Divorces," (1945) 61 *L.Q.R.* 352.

¹ *Bater v. Bater*, [1906] P. 209; see pp. 436, 437, *post*.

² At pp. 380, 398, 426, *post*.

³ See p. 164, *ante*.

⁴ 2 Beale, 702.

courts over divorce petitions and the law applicable to the relevant issues.

A. Jurisdiction.

(a) IN ORDINARY CASES: COMPETENCE OF THE COURTS OF MATRIMONIAL DOMICIL. It is to-day generally accepted that the jurisdiction to pronounce a decree of divorce is—apart from two slight statutory exceptions¹—exclusively based on the matrimonial domicile of the spouses, i.e. the domicile of the husband at the time of the institution of the suit.² This rule was established in 1895 in *Le Mesurier v. Le Mesurier*³ where Lord Watson observed—

The domicile for the time being of the married pair affords the true test of jurisdiction to dissolve their marriage.

In *A.G. for Alberta v. Cook*⁴ the rule was confirmed as follows:

Under British law one of the effects of marriage is to give to the spouses a common domicile—the domicile of the husband. Within the jurisdiction thereby arising, and by the marriage laws of which the spouses are subject, the claims of either of them to a decree of dissolution of marriage ought to be determined. In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant⁵ in the suit shall be domiciled within the jurisdiction.

Before *Le Mesurier v. Le Mesurier*,⁶ it was widely believed that the jurisdiction of the courts in divorce petitions was based on the residence of one or both of the parties within the jurisdiction. In 1878, in *Niboyet v. Niboyet*⁷ the majority of the Court of Appeal held that the English courts had jurisdiction to entertain the divorce petition of a wife resident in England whose husband was domiciled in France. The majority based its view on the construction of the Matrimonial Causes Act, 1857, which provided that the newly created Divorce Court should have the same jurisdiction as that possessed formerly by the ecclesiastical courts whose jurisdiction was based on residence within their diocese. The “obvious fallacy” of this reasoning consisted, as was pointed out in *Le Mesurier v. Le Mesurier*⁶, in the

¹ See p. 317, *post*.

² *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; *A.G. for Alberta v. Cook*, [1926] A.C. 444; *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146; *Wilson v. Wilson* (1872), L.R. 2 P.D. 435; *Niboyet v. Niboyet*, dissenting opinion of Brett, L.J. (1878), L.R. 4 P.D. 1, 8; *Nachimson v. Nachimson*, [1930] P. 217, 226; *Bater v. Bater*, [1906] P. 209.

³ [1895] A.C. 517.

⁴ [1926] A.C. 444, 465 (the law of the Province of Alberta which was in issue in this case, was the same as that of England).

⁵ This was the husband.

⁷ (1878), L.R. 4 P.D. 1.

⁶ [1895] A.C. 517, 531.

inference that, because the jurisdiction in suits for judicial separation and for restitution of conjugal rights had been based on residence, the new jurisdiction in divorce matters, which was vested by the Act of 1857 for the first time in a court, must be governed by the same principle. The opposite is correct because divorce alters the personal status of the parties. Brett, L.J., had already demonstrated in his dissenting judgment in *Niboyet v. Niboyet*,¹ which to-day represents the law, that the *lex domicilii* was the only test compatible with the status character of marriage.

The principle of the *lex domicilii* is strictly observed as regards petitions for divorce. The English courts will entertain a divorce petition only if the matrimonial domicile of the parties was, at the commencement of the suit, within the jurisdiction, and they will decline to exercise jurisdiction if this requirement is not complied with. It is, therefore, immaterial where the marriage was celebrated,² where the parties were domiciled at the time of the solemnisation of the marriage or prior to the commencement of the divorce suit, what their nationality is,³ where they are resident,⁴ where the alleged misconduct took place,⁵ or whether they have expressly submitted to the jurisdiction of the English courts.⁶ It is a noteworthy result that the English courts will leave the dissolution of a marriage celebrated in England by English subjects, who at the time of the marriage were domiciled in England, to a foreign court, if it is proved that subsequently the husband has acquired a domicile elsewhere.⁷

Conversely, the English courts recognise and give full effect to the decree of a foreign court pronouncing the dissolution of the marriage of parties who, at the beginning of the suit, were domiciled within its jurisdiction, but refuse such recognition to the pronouncement of a foreign court not based on such domicile.⁸ If, therefore, persons domiciled in a country not admitting a divorce at all, like Eire or Spain, attempt to evade the restrictions of their law of matrimonial domicile by obtaining a divorce in a country with less stringent divorce

¹ (1878), L.R. 4 P.D. 1, 12.

² Cf. *Ratcliff v. Ratcliff* (1859), 1 Sw. & Tr. 467; *Wilson v. Wilson* (1872), 2 P. & D. 435; *Turner v. Thompson* (1888), 13 P.D. 37.

³ *Niboyet v. Niboyet* (1878), 4 P.D. 1.

⁴ *Goulder v. Goulder*, [1892] P. 240; *A.G. for Alberta v. Cook*, [1926] A.C. 444; *Warrender v. Warrender* (1835), 2 Cl. & F. 488.

⁵ *Wilson v. Wilson* (1872), 2 P. & D. 435.

⁶ *Hyman v. Hyman*, [1929] P. 1, 30; *Armitage v. A.G.*, [1906] P. 135, 140.

⁷ *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *Harvey v. Farnie* (1882),

8 App. Cas. 43.

⁸ *Green v. Green*, [1893] P. 89; *Earl Russell's Trial*, [1901] A.C. 446; *Lanckester v. Lanckester*, [1925] P. 114; *Shaw v. Gould* (1868), L.R. 3 H.L. 55.

laws, such divorce—unless recognised by the *lex domicilii*—would not be recognised by English law and a subsequent marriage would be bigamous.¹

It should, however, be observed that the law of matrimonial domicile may, by way of *renvoi*,² transmit the power to divorce its domiciliaries to courts of a third country and may recognise divorce decrees of those courts as equal in validity to those of its own courts. In such cases, English law, having no reason to be stricter than the foreign *lex domicilii*, will also recognise as valid a divorce decree of the courts of the third country.

Thus, in *Armitage v. A.G.*³ a woman whose husband was domiciled in New York instituted divorce proceedings in the American State of South Dakota after having taken up a temporary residence there in order to enable the court to exercise its jurisdiction.

The divorce decree which was based on the ground of desertion was recognised in New York as valid though desertion was not admitted as a ground for divorce by the laws of New York.

Subsequently, the woman, who had afterwards married a domiciled Englishman, Mr. Armitage, and had four children from him, brought a petition in the English court praying for a declaration as to the validity of her marriage to Mr. Armitage. The issue depended on the validity of the divorce decree of the courts of South Dakota, for if it was valid, the subsequent marriage of the petitioner to Armitage was also valid.

Sir Gorell Barnes, P., decided in favour of the petitioner. "The point then is: Are we in this country to recognise the validity of a divorce which is recognised as valid by the law of the domicile? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognised in the State of New York—the State of the domicile—as having affected and determined it."

The English courts will recognise the jurisdiction of the foreign law of matrimonial domicile even if it admits the dissolution of the marriage by other means than the judicial process; e.g. by a legislative measure,⁴ by the pronouncement of a religious court or institution,⁵ or, it is believed, even by the decision of an administrative authority. On the other hand, English law refuses to give effect to a unilateral act of divorce pronounced by one spouse because it is against natural justice for a person to be a judge in his own cause.⁶

¹ *Bater v. Bater*, [1906] P. 209; *Harvey v. Farnie* (1880), 5 P.D. 153; (1882), 8 App. Cas. 43; *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; *Lankester v. Lankester*, [1925] P. 114.

² See p. 89, *ante*, and 1 Beale, 470.

³ [1906] P. 135.

⁴ The procedure of a private Bill is still employed in Northern Ireland and Quebec; Dicey, 5th ed., p. 424.

⁵ *Sasson v. Sasson*, [1924] A.C. 1007.

⁶ P. 319, *post*.

(b) EXCEPTIONS. In a few exceptional instances, the principle of the *lex domicilii* has been relaxed for reasons of convenience.

(i) THE MATRIMONIAL CAUSES ACT, 1937, SECT. 13. The rule, that the courts of the domicile of the husband at the commencement of the suit are solely entitled to grant a divorce, is sometimes apt to produce hardship. If, e.g., the husband's whereabouts are unknown or if he lives in a distant foreign country making the bringing of divorce proceedings onerous for the wife, the wife who is denied an independent domicile during coverture is nevertheless bound in matrimony. The English courts were at one time disposed to entertain the petition of a deserted wife; especially if the suit was undefended, though such jurisdiction was exercised contrary to principle, and only *ex misericordia*.¹ However, after the decision of the Judicial Committee in *A.G. for Alberta v. Cook*,² which disapproved of that relaxation, the Courts reverted to the strict rule of the *lex domicilii* and refused to entertain the divorce petition of a deserted wife even if it was undefended.³

In this state of affairs, Parliament intervened. By the Matrimonial Causes Act, 1937, Sect. 13, it is provided that—

where a wife has been deserted by her husband or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England and Wales, the court shall have jurisdiction . . . notwithstanding that the husband has changed his domicile since the desertion or deportation.⁴

By this provision the courts have been authorised to entertain the divorce suits or other matrimonial causes of wives whose husbands have gone abroad for good. It should, however, be noted that the Act covers only those cases where the husband's *last* domicile prior to the desertion or deportation was in England or Wales. It is, therefore, not sufficient that the husband was at *any* time before the desertion domiciled within the jurisdiction or that he was born domiciled in England or Wales. The section, moreover, does not

¹ *Stathatos v. Stathatos*, [1913] P. 1, 46; *De Montaigne v. De Montaigne*, [1913] P. 154.

² *H. v. H.*, [1928] P. 206; *Herd v. Herd*, [1936] P. 205.

⁴ A further—temporary—relaxation of the strict rule of the *lex domicilii* was admitted by the Matrimonial Causes (War Marriages) Act, 1944, which accords English Courts jurisdiction in proceedings for divorce and nullity of marriages concluded on or after 3rd September, 1939 between women who immediately before the marriage were domiciled in the United Kingdom and men who at the time of the marriage were domiciled outside the United Kingdom. In these cases the ordinary three years bar to divorce petitions (Matrimonial Causes Act, 1937, Sect. 1) has been dispensed with. The Act may not be invoked by wives who resided after the marriage in the country of domicile of the husband.

require the deserted wife to be resident within the jurisdiction when bringing her petition.

In Canada as well as in New Zealand, enactments were passed in 1930¹ empowering the courts to entertain divorce petitions of deserted wives, but in both instances the conditions subject to which the courts may assume jurisdiction are different from those laid down in the English Act. In the United States the deserted wife is similarly entitled to institute, in the last matrimonial domicile, divorce proceedings against the husband who has deserted her.²

(ii) *INDIAN AND COLONIAL DIVORCES*. The Indian and Colonial Divorce Jurisdiction Acts, 1926-1940, confer jurisdiction on the courts of certain British colonies or parts of the British Commonwealth of Nations (other than self-governing Dominions) to dissolve marriages of British subjects domiciled in England or Scotland, if the petitioner resides in the territory in question at the time of the filing of the petition and either the marriage was solemnised there or the misconduct took place there. The jurisdiction of the colonial courts is, however, only subsidiary to that of the courts of the domicile: the colonial courts may refuse to exercise their jurisdiction if the petitioner is wealthy enough to sue in the courts of the domicile or if there is no sufficient cause why the colonial courts should deal with the matter, and they are bound to refuse their jurisdiction if they are not satisfied that it is in the interests of justice that the suit should be determined in the colony in question.

The Acts have by Order in Council been extended to Kenya Colony,³ the Straits Settlements,⁴ Jamaica,⁵ Hong-Kong.⁶

The provisions of the Acts conferring jurisdiction on the High Courts of British India to dissolve marriages in the circumstances indicated earlier, have been repealed by the Indian Independence Act, 1947.⁷

B. The law applicable. In accordance with principle, the substantive law governing divorce is determined by the law of the matrimonial domicile of the spouses at the time of the institution of the suit. This law determines, in particular, whether the marriage can be

¹ Canada: The Divorce Jurisdiction Act, 1930; New Zealand: The Divorce and Matrimonial Causes Act, 1930.

² Sixth proposition in *Haddock v. Haddock* (1906), 201 U.S. 562, 570, and 1 Beale, 482, 507.

³ S.R. & O., 1928, No. 635.

⁴ S.R. & O., 1931, Nos. 851, 1103.

⁵ S.R. & O., 1932, Nos. 475, 646.

⁶ S.R. & O., 1935, No. 836.

⁷ Sect. 17. Similar repeals are provided by the Burma Independence Act, 1947, s. 5 (formerly S.R. & O., 1937, No. 230), and the Ceylon Independence Act, 1947, s. 3, (formerly S.R. & O., 1936, No. 562).

dissolved at all, and, if so, on what grounds. If the parties are domiciled abroad, the grounds for the divorce are exclusively regulated by the foreign law of the matrimonial domicile which may provide more or less stringent grounds for divorce than English law.

As regards the first alternative, foreign law may even consider a marriage as indissoluble; this is e.g. the present position in Eire, the Argentine and Spain.¹ The English courts give full effect to such law because they do not consider it as an inherent right of the spouses to claim the dissolution of the marriage in certain contingencies.²

With respect to the second alternative, it is no objection in law that under the foreign law of the matrimonial domicile, a divorce can be obtained more easily than under English law. Thus, English courts did not refuse recognition to a French divorce decree based on the ground of a desertion extending over three years, at a time when English law did not admit such a ground for divorce,³ and decrees of American⁴ and German⁵ courts pronouncing divorces of their domiciliaries on the grounds of incompatibility of temperament are fully recognised in English law though these grounds are even to-day not recognised grounds of divorce under English municipal law. It appears only as a logical development of the reasoning underlying these decisions that, if a foreign law admits the dissolution of marriage by mutual consent of the parties, English law will recognise that law for the domiciliaries of the country in question. This conclusion is supported by *Nachimson v. Nachimson*⁶ though there the question at issue was not the recognition of an actual dissolution of marriage, but whether, in view of the ease with which a dissolution can be obtained, the union constituted what in the language of the law is termed a "Christian marriage."

Beyond this point the principle of the *lex domicilii* is not operative since it is met by superior considerations of English general policy. It would be going too far to assume that English law would recognise a foreign divorce effected by the unilateral act of one of the spouses, against the will of the other spouse, even if such a procedure were admitted by the law of matrimonial domicile of the parties. Here a principle of substantial justice is involved as indicated in *Dr. Mir-*

¹ For other countries where the marriage is at present indissoluble, see E. Rabel, *Conflict of Laws*, Vol. I, 1945, p. 430.

² See *per* Scrutton, L.J., in *Casdagli v. Casdagli*, [1918] P. 89, 106; [1919] A.C. 145.

³ *Pastre v. Pastre*, [1930] P. 80; see to-day Matrimonial Causes Act, 1937, S. 2.

⁴ *Pemberton v. Hughes*, [1899] 1 Ch. 781.

⁵ *Mezger v. Mezger*, [1937] P. 19, 26.

⁶ [1930] P. 217; see p. 38, *ante*.

Anwaruddin's case.¹ In this case a Mohammedan, domiciled in India, had during a visit to England, married an Englishwoman before the Registrar at Hammersmith and claimed to have divorced her by the process of *Talak*, a unilateral act of divorce admitted by Mohammedan law. The admissibility of *Talak* was, in fact, rejected for the reason that a marital union which in form and essence is a Christian marriage cannot be dissolved by divorce rites suitable for polygamous marriages. A further consideration was added by Lawrence, J., which, it is believed, is of a general character.² The learned Judge observed—

I think it is contrary to natural justice that a man should be judge in his own cause and determine his marriage at his own will and pleasure.

For the same reason, English law would probably not recognise the dissolution of a Jewish marriage by service of a divorcement writing (" *Ghet* ") by the husband on the wife, if she is unwilling to accept it,³ even if the law of matrimonial domicile of the parties should permit this procedure.

C. Suits against co-respondents. According to English and some foreign laws, the husband whose wife has committed adultery is entitled to damages against the adulterer.⁴ The problem that has now to be examined is: which court has jurisdiction to entertain this claim?

It should be noted that a claim against the co-respondent for damages is different in character from a divorce petition. In the words of Sir Samuel Evans, P.,⁵

the claim against the co-respondent is merely a money claim, a personal claim, or as it is sometimes called a transitory claim. There is no complication arising from questions of international law, as there is where the status of persons under marriage laws is concerned.

This character of the claim against the co-respondent rules out the assumption that jurisdiction against him must be based on his domicile.

In the English conflict of laws, the claim for damages against the co-respondent is regarded as " ancillary and accessory to the judg-

¹ [1917] 1 K.B. 634, 662.

² 2 Beale, 703.

³ *Spivack v. Spivack* (1930), 99 L.J. P. 52. In *Sasson v. Sasson*, [1924] A.C. 1007 the Jewish divorce was pronounced by a competent Rabbinical court.

⁴ If no damages are claimed from the co-respondent the English court has jurisdiction over the co-respondent but may be inclined to dispense with his citation, in particular if he has been informed of the proceedings, so that he can clear himself of the allegation if he desires to do so (*Boger v. Boger*, [1908] P. 300; *Grange v. Grange*, [1892] P. 245).

⁵ In *Rayment v. Rayment*, [1910] P. 271, 290.

ment as to status.”¹ In consequence, the courts competent to pronounce the divorce decree, i.e. ordinarily the courts of the domicile of the husband, have jurisdiction to award damages and costs against the adulterer.² English courts claim this jurisdiction when the matrimonial domicile of the parties is in England, and they derive to-day their jurisdiction from the authority of a statute, i.e. the Judicature Act, 1925, Sect. 189 re-enacting the Matrimonial Causes Act, 1857, s. 33. Conversely, English law accords to foreign courts competent to dissolve the marriage of the spouses ancillary jurisdiction over the co-respondent.³ In both cases the domicile, residence or nationality of the co-respondent and the place where the misconduct has been committed are immaterial.

Apart from the possibility of claiming damages from the co-respondent in ancillary proceedings, such a claim may be pursued independently of the divorce suit. According to Common Law, it is a tort against the husband to have criminal conversation with his wife, and, though the Common Law principle is now regulated by statute,⁴ it has not been overridden by the enactments in question and can, as previously, form the basis of an independent action in tort,⁵ provided that the general conditions on which an action for tort is entertained by the English courts⁶ have been satisfied, i.e. that if the misconduct took place abroad the adultery is also actionable under the *lex loci delicti*.

3. PETITIONS FOR ANNULMENT.

A. Distinction between voidable and void marriages. The principle of the *lex domicilii* also plays a prominent part in the determination of the jurisdiction of the courts in nullity suits and of the law applicable to them, because, as explained earlier,⁷ these suits directly affect the personal status of the parties.

Proceedings for the annulment of a marriage might be brought in respect of two types of marriage, namely marriages voidable at the will of a spouse, and marriages absolutely void by operation of law.

The annulment of a voidable marriage is left entirely to the dis-

¹ See *per* Scrutton, J., in *Philipps v. Batho* (1913), 82 L.J. K.B. 882, 886.

² *Rayment v. Rayment*, [1910] P. 271, 290; *Rush v. Rush*, [1920] P. 242; *Philipps v. Batho* (1913), 82 L.J. K.B. 882.

³ *Philipps v. Batho* (1913), L.J. 82 K.B. 882.

⁴ The Judicature Act, 1925, s. 189, re-enacting the Matrimonial Causes Act, 1857, s. 33.

⁵ *Kent v. Atkinson* [1923] P. 142, 149; *Rayment v. Rayment*, [1910] P. 271, 286.

⁶ See p. 144, *ante*.

⁷ See p. 311, *ante*.

cretion of the aggrieved spouse. If the spouse elects not to exercise the discretion, the marriage continues to subsist in law as a perfectly valid marriage.¹ A decree of the competent court is necessary to annul a voidable marriage, and where it is obtained the status of marriage is, in some respects,² abrogated retrospectively. Thus, a voidable marriage differs from, say, a marriage which can be dissolved by divorce, since divorce operates *ex nunc*. Examples of voidable marriages occur where a party may petition to have the marriage annulled because it had never been consummated by reason of a physical incapacity or the wilful refusal of the other party.³

A void marriage, on the other hand, is a nullity in law and cannot at any time create a marriage status between the parties. The marriage is in this case void *ab initio* and incapable of ratification by the parties. A decree of the court is not required to annul it,⁴ and where it is obtained it merely states authoritatively that the parties have never been husband and wife in law. It must, however, be remembered that such a declaration does affect the personal status of the parties.⁴ A marriage is, e.g., absolutely void if it is bigamous or contravenes an absolute prohibition of the *lex domicilii* of the parties at the date of the marriage.

It has been denied, even from the judicial Bench,⁵ that a distinction exists between voidable and void marriages, and it has been asserted that the English courts have jurisdiction over voidable marriages in the same circumstances as govern the jurisdiction over void marriages. This view, which implies a return to the "obvious fallacy" of the reasoning in *Niboyet v. Niboyet*⁶ and is hardly reconcilable with the decision of the House of Lords in *Le Mesurier v. Le Mesurier*⁷ has been rejected in the leading case of *De Reneville v. De Reneville*.⁸ In that case,—

The husband was a Frenchman who was domiciled and resident in France, and the wife was an Englishwoman who was domiciled in England before her marriage which was celebrated in France.

¹ *Inverclyde v. Inverclyde*, [1931] P. 29, 40; *Smith v. Smith*, [1947] 2 All E.R. 741.

² *Newbould v. A.G.*, [1931] P. 75; *In re Dewhurst*, (1948) 64 T.L.R. 74. But the wife does not regain her capacity of having a separate domicile retrospectively; see p. 85, *ante*.

³ Matrimonial Causes Act, 1937, Sect. 7 (1) (a).

⁴ See p. 312, *ante*.

⁵ *Pilcher, J.*, in *Hutter v. Hutter*, [1944] P. 95; see also *Hodson, J.*, in *Easterbrook v. Easterbrook* (1943), 60 T.L.R. 80, and *Barnard, J.*, in *Robert v. Robert*, (1947), 63 T.L.R. 343; see also *J. F. Garner*, "Jurisdiction and the Choice of Law in Nullity Suits," in (1947) 63 L.Q.R. 486.

⁶ (1878), L.R. 4 P.D. 1; see p. 311, *ante*.

⁷ [1895] A.C. 517.

⁸ (1948), 64 T.L.R. 82 (C.A.); [1947] P. 168. See also *Adams v. Adams* [1941] 1 K.B. 536, *per Scott, L.J.*, at p. 541, and *per Goddard, L.J.*, at p. 547.

The parties lived for a number of years in France and the French colonies; the wife then returned to England and the husband continued to live in France. The wife petitioned for annulment on the ground of her husband's alleged impotence or wilful refusal to consummate the marriage, and the preliminary issue arose whether the English courts had jurisdiction to entertain the petition.

The Court of Appeal held that the answer depended on the question whether, in the allegation of the wife, the marriage was voidable or void. If it was merely voidable, the wife had a dependent domicile until the annulment of her marriage by decree of the court¹; she then was still domiciled in France, and the English courts had no jurisdiction to entertain the petition. If, on the other hand, the marriage was void, she was capable of acquiring a separate domicile and, on her return to England, had resumed her English domicile of origin; in this case, the English courts had jurisdiction to entertain the petition.

The question, whether the marriage was voidable or void on the grounds alleged by the wife, had to be answered by French law as the law of the matrimonial domicile because it involved a matter pertaining to the essential validity of the marriage.² Since no evidence was offered as to the position under French law, it had to be presumed that French law was the same as English law where the alleged grounds for the petition would render the marriage merely voidable.³ Consequently, the English courts had no jurisdiction to deal with the petition.⁴

B. Voidable marriages. Voidable marriages are, from the point of view of the conflict of laws, in a similar position to marriages which can be dissolved by divorce. Both types of marriage have in common that they can be dissolved at the will of the aggrieved spouse. It is merely a historical accident that the remedy available for the dissolution of a voidable marriage is a decree of nullity, and not a decree of divorce. The reason for this anomaly is that, until 1857, a divorce could only be obtained by private Act of Parliament, a procedure too costly to be available to the majority of the people; so the ecclesiastical courts which were competent to declare the nullity of absolutely void marriages offered, by a benevolent interpretation of their jurisdiction, relief in at least some cases, which became technically known as voidable marriages.

The essential similarity of voidable marriages and marriages dissoluble by divorce leads to the conclusion that the rules expounded earlier with respect to divorce suits are equally applicable to suits concerning the annulment of voidable marriages. The strict *lex domicilii*, therefore, will govern alike the jurisdiction of the courts⁵ to entertain

¹ See p. 85, *ante*.

² See p. 299, *ante*.

³ See p. 374, *post*.

⁴ The Court also rejected the alternative argument that it had jurisdiction because the petitioner was resident within the jurisdiction; see p. 328, *post*.

⁵ It should be noted that the Matrimonial Causes Act, 1937, s. 13, applies also to nullity suits, since it is expressly provided that the Act applies to any proceedings under Part VIII of the Judicature Act, 1925.

such suits, and the law determining the annulment of the marriage in question. This was stated by Bateson, J., in *Inverclyde v. Inverclyde*¹ as follows—

It seems to me that if the principle is sound that in a suit for dissolution of marriage in divorce jurisdiction depends on domicile it must equally so depend in a suit for dissolution of marriage on the ground of impotence. To call it a suit for nullity does not alter its essential and real character of a suit of dissolution. That is a mere difference in form, as Sir James Hannen said in *Turner v. Thompson*.² The usual relief in the United States I understand from that case is dissolution and not nullity.

C. Void marriages. The rules governing the jurisdiction of the courts over absolutely void marriages and the substantive law applicable to those marriages are much more complicated.

(a) JURISDICTION. As regards jurisdiction, three possibilities exist. A suit for the annulment of a void marriage may be instituted in one of the following three *fora*—

- (i) in the courts of the place of domicile of the parties,
- (ii) in the courts of the place of celebration of the marriage,
- (iii) in the courts of the place of residence of the respondent.

(i) COMPETENCE OF THE COURTS OF THE PLACE OF DOMICIL. The view, that both the English and foreign courts of domicile of the parties at the time of the institution of the suit are competent to declare the nullity of a marriage on the ground that it was void *ab initio*, is based on the decision of the House of Lords in the Scottish case of *Salvesen v. Administrator of Austrian Property*.³

In this case, the issue was the validity of a marriage between an Englishwoman, domiciled before her marriage in Scotland, and an Austrian.

The marriage was concluded in Paris, and the parties lived, except during the First World War, in Wiesbaden in Germany, where they acquired a domicile of choice. Shortly after the war, the movable property of the wife situate in Scotland was claimed by the Administrator for the reason that she became an Austrian subject by marriage.

Thereupon the Englishwoman applied to the court of Wiesbaden, i.e. the court of her domicile, asking for the annulment of her marriage on the ground that certain formalities prescribed by French law as the *lex celebrationis* had not been observed, and the court of Wiesbaden declared her marriage as void *ab initio*. The Englishwoman then contested the claim of the Administrator denying that she had acquired Austrian nationality.

The question before the courts was whether the decree of nullity by the Wiesbaden court was pronounced by a court of competent jurisdiction, and if so, whether it was binding on the Scottish courts. If the decree was binding on the Scottish courts, the Englishwoman was entitled to the movables, otherwise the Administrator had the better claim.

¹ [1931] P. 29, 42.

² (1888), 13 P.D. 37, 40.

³ [1927] A.C. 641.

The House of Lords decided in favour of the Englishwoman. Their Lordships based their decision on the ground that the declaration of nullity affects the personal status of the parties to the union whether it is found that the status of marriage or celibacy exists between them and that, therefore, the courts of their common domicile are competent to clarify, by declaration, the position regarding that status. It was further held that the nullity decree of the German court being in the nature of a judgment *in rem* was binding everywhere.¹

The importance of this case lies in the fact that the decision of the House of Lords was based on the broad principle that all matters pertaining to the status of marriage or celibacy are properly cognisable by the courts of domicile of the parties. The general propositions evolved by the House of Lords in this case permit of the inference drawn by most writers on the conflict of laws,² that the rule in *Salvesen's* case applies not only to the case of persons domiciled abroad, but also governs the jurisdiction of the English courts over their domiciliaries.

It should, however, be noted that the nullity decree of a foreign court of domicile has no effect within the English jurisdiction if the marriage was celebrated in England and is valid by English law.³ Further, the exceptional jurisdiction of the Matrimonial Causes Act, 1937, Sect. 13 in favour of deserted wives is also available for nullity suits brought in connection with absolutely void marriages.⁴

(ii) *COMPETENCE OF THE COURTS OF THE PLACE OF SOLEMNISATION OF MARRIAGE.* Nullity suits in respect of void marriages are further entertained in the courts of the country where the marriage was celebrated.⁵ Those courts are particularly fitted to adjudge on the question whether a marriage is formally valid or not, for that question is determined by the *lex celebrationis* which is administered by those courts as their municipal law. It is, however, noteworthy that the competence of the courts of the place of celebration of marriage is not confined to questions of form, but extends to all cases where the invalidity of a marriage is at issue. To hold otherwise would lead to practical difficulties since the question whether a marriage

¹ Extracts from the judgment will be found on p. 312, *ante*.

² Dicey, 5th ed., p. 295; Westlake, 7th ed., pp. 95-6; Foote, 5th ed., p. 157; Cheshire, 3rd ed., pp. 463-5.

³ See p. 308, *ante*.

⁴ See p. 317, *ante*.

⁵ *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; *Ogden v. Ogden*, [1908] P. 46; *Mitford v. Mitford*, [1923] P. 130; *Scrimshire v. Scrimshire* (1752), 2 Hagg. Cons. 395; *Linke v. Van Aerde* (1894), 10 T.L.R. 426; *Cooper v. Cooper*, [1891] P. 369; *Roach v. Garvan* (1748), 1 Ves. Sen. 157; *Valier v. Valier* (1925), 133 L.T. 830; *Hussein v. Hussein*, [1938] P. 161. Lord Phillimore expressed in *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, 671, the view that the courts of the *lex domicilii* were solely competent to entertain nullity suits concerning void marriages; but this view is not generally accepted.

incident pertains to form or to substance can hardly be decided on a preliminary objection to the jurisdiction of the court, but is a question of substantive law and should be decided as such.¹

The English courts have readily exercised this jurisdiction in cases where the marriage was celebrated in England, as, e.g., in *Simonin v. Mallac*² and *Ogden v. Ogden*³ (though in the former case both parties were domiciled abroad at the commencement of the suit).⁴ Conversely, in *Mitford v. Mitford*,⁵ the nullity decree of a German court was recognised as binding on the English courts apparently because the celebration of the marriage took place in the German jurisdiction, notwithstanding the fact that the husband was domiciled in England. The headline of that case in the *Law Reports* runs as follows—

The validity of a marriage between a domiciled Englishman and a woman domiciled in a foreign country celebrated in that country is a matter properly cognisable by the courts of that country.

Unfortunately, the authority of *Mitford v. Mitford*⁵ is, as rightly pointed out by Professor Cheshire,⁶ somewhat doubtful, because it is not quite clear which of the following two facts has been regarded as the decisive one by the court, i.e. that Germany was the *locus celebrationis* of the marriage or else that it was the place of residence of the respondent at the time of the institution of the suit. On principle, the decree of a foreign court declaring as invalid a marriage celebrated within its jurisdiction should be recognised by the English courts even though the parties to the marriage were domiciled in England.

(iii) *COMPETENCE OF THE COURTS OF THE PLACE OF RESIDENCE.* As regards the competence of the courts of residence of the parties to a marriage to adjudicate upon the validity of that marriage, Bucknill, J.,⁷ significantly observed that "the essential ingredients . . . have not been clearly established by the reported cases." On principle, little can be said in favour of this jurisdiction. It is mainly due to historical reasons that the English courts have developed such jurisdiction if at the commencement of the suit the respondent is resident within the jurisdiction.⁸ How far a corresponding competence of the foreign courts is recognised by English law appears even more obscure.

The jurisdiction of the English courts in cases where only the

¹ These difficulties were considered in *De Reneville v. De Reneville*, (1948), 64 T.L.R. 82. ² (1860), 2 Sw. & Tr. 67. ³ [1908] P. 46.

⁴ Compare also the facts of *Linke v. Van Aerde* (1894), 10 T.L.R. 426 and *Cooper v. Cooper*, [1891] P. 369. (Both cases were undefended.)

⁵ [1923] P. 130.

⁶ 3rd ed., p. 461.

⁷ In *White v. White*, [1937] P. 111, 123.

⁸ Dicey, 5th ed., Rule 65, 1 (ii), p. 215; Westlake, 7th ed., p. 94; Halsbury's *Laws of England* (Hailsham ed.), Vol. X, p. 640, No. 935.

residence of the respondent, but neither the domicile of the respondent nor the place of solemnisation of the marriage is within the jurisdiction, is based on sect. 21 of the Judicature Act, 1925, incorporating sect. 6 of the Matrimonial Causes Act, 1857. Thereby it is provided that the High Court is to have such jurisdiction as before the commencement of the Matrimonial Causes Act, 1857, was vested in the ecclesiastical courts with respect to nullity suits. Since the jurisdiction of the ecclesiastical courts was based on residence, it can hardly be disputed that, by virtue of the Act, the English courts are entitled to exercise to-day the same jurisdiction in nullity suits. To that extent, the position has been correctly summed up by Sir Francis Jeune, P.,¹ who said that "residence—not domicile—is the test of jurisdiction in a nullity case."

There is on record no positive decision recognising as absolutely effective in English law the nullity decree of a foreign court in the jurisdiction of which the respondent resides but which is not the court of domicile of the respondent nor that of the *locus celebrationis*. It is submitted that such a decree should not be entitled to recognition in this country. In nullity suits jurisdiction based on residence is anomalous. That the English courts assume jurisdiction in these cases at all is due to express statutory authority and not warranted by principle. No conclusion can be drawn therefrom to the corresponding jurisdiction of foreign courts. Dicey² observes correctly that

it would seem that the courts of a foreign country, where the parties are not domiciled but merely reside, are not, in general at least, held by English Judges to be courts of competent jurisdiction for determining the validity of a marriage which does not take place in such foreign country.

This view is reconcilable with the observations of Sir Henry Duke, P., in *Mitford v. Mitford*,³ who held that a German court, in whose jurisdiction a marriage was celebrated and the respondent was resident, was competent to declare the marriage as invalid; for of the two reasons adduced by the learned President the first one, that Germany was the *locus celebrationis*, was sufficient to support the decision, while the other reason, viz., that Germany was the place of residence of the respondent, appears to be in the nature of an *obiter dictum*.

In two undefended cases, *White v. White*⁴ and *Robert v. Robert*,⁵ it was held that the English court has jurisdiction to invalidate a

¹ *Roberts v. Brennan*, [1902] P. 143, 144; see further *White v. White*, [1937] P. 111; *Linke v. Van Aerde* (1894), 10 T.L.R. 426; *Valier v. Valier* (1925), 133 L.T.R. 830.

² 5th ed., p. 435. ³ [1923] P. 130; see p. 326, *ante*. ⁴ [1937] P. 111.

⁵ (1947), 63 T.L.R. 343.

marriage if the petitioner only and not the respondent is resident within the jurisdiction. In the former case which concerned the annulment of a bigamous marriage, it was indicated that the decision might have been different if the respondent had protested against the jurisdiction.¹ However, it should not make any difference to the decision whether the suit is defended or not, as is demonstrated by the advice of the Privy Council in *A.G. of Alberta v. Cook*² in an undefended divorce suit. Further, in such a case as this, as in the analogous case of judicial separation, the ecclesiastical courts apparently assumed jurisdiction only if the respondent was resident within their diocese. In *Graham v. Graham*,³ where the decisions of the ecclesiastical courts are carefully examined, Horridge, J.,⁴ observed with respect to the ecclesiastical jurisdiction that

where residence is relied upon to found jurisdiction it must be shown that the respondent is resident in the jurisdiction at the time of the citation being issued and the proceedings commenced.

The view that the English courts have jurisdiction to entertain a nullity suit where the petitioner only is resident within their jurisdiction, has been finally rejected in *De Reneville v. De Reneville*⁵ where Lord Greene, M.R., observed⁶ :—

That a wife who is resident but, *ex hypothesi*, not domiciled here can compel her husband, who is both domiciled and resident abroad, to come to this country and submit the question of his status to the courts of this country appears to me contrary both to principle and to convenience.

The requirement, that the respondent must be *resident* in the jurisdiction, does not, however, mean that he (or she) must be *present* there. Residence as a pre-requisite of this kind of jurisdiction should not be confused with presence which determines the method of service of the writ. If the respondent is normally resident in this country but is travelling abroad, be it on business or pleasure, the English courts are competent to exercise their jurisdiction, and service out of the

¹ The decision is, however, correct and would have been in accordance with principle if solely based on the additional ground that the woman petitioner had retained her English domicile in fact because she stayed only two days after the ceremony with the man, never consummated the marriage and had evidently not the intention of relinquishing her English domicile; see the explanation of the case by Lord Greene, M.R., in *De Reneville v. De Reneville*, (1948), 64 T.L.R. 82, at p. 86; and see p. 295 *ante*. See, further, Lord Greene's comment on *Roberts v. Brennan*, [1902] P. 143 (*ibid.*, p. 86). ² [1926] A.C. 444.

³ [1923] P. 31. See also Shelford's *Law of Marriage and Divorce*, 1841, pp. 486-7; and Pilcher, J., in *Hutter v. Hutter*, [1944] P. 95, 99 and in *Sim v. Sim*, [1944] P. 87. ⁴ At p. 37. ⁵ (1948), 64 T.L.R. 82.

⁶ *ibid.*, at p. 87.

jurisdiction will, in appropriate cases, be ordered.¹ This distinction was made clear by Lord Merrivale² in the following passage—

A seaman ordinarily absent from this country is resident in the home which he provides here for his wife. So is a man of business whose employment keeps him constantly abroad.³

(b) THE LAW APPLICABLE. The problem before the courts in nullity suits concerning invalid marriages is invariably to ascertain whether the union between the parties represents, in law, a valid marriage. Since the requirements of a valid marriage have been explained in the section dealing with the conclusion of the marriage, it suffices here to refer to those observations.⁴

4. PETITIONS FOR JUDICIAL SEPARATION.

The decree pronouncing the judicial separation of the parties does not change the status of the spouses, nor does it savour of *res*. After the pronouncement of a decree of separation the status of marriage continues to subsist between the parties who are still husband and wife in law, but some of the obligations of the spouses under their marriage agreement are suspended by the decree. The decree produces, however, a collateral effect on the personal status of the parties in two directions: it can, upon simplified evidence,⁵ be converted into a decree of divorce, and it creates, further, in appropriate circumstances an estoppel against subsequent nullity proceedings by the same petitioner.⁶ This peculiar characteristic of a decree for judicial separation explains the statement of Sir Henry Duke, P., that⁷

domicil gives jurisdiction to decree judicial separation, and the jurisdiction also arises where there is residence of the respondent.

A. Jurisdiction.

(a) COMPETENCE OF THE COURTS OF MATRIMONIAL DOMICIL. In view of the collateral effect on personal status which a decree of judicial separation produces, the courts of the matrimonial domicile are generally considered as competent to pronounce such decrees, even if the respondent is not resident within the jurisdiction at the commencement of the suit.⁸ Here again, the exceptional jurisdiction of the Matri-

¹ Matrimonial Causes Rules, 1947, r. 9.

² *Raeburn v. Raeburn* (1928), 44 T.L.R. 384, 386 (case of judicial separation).

³ For further examples of this rule, see p. 331, *post*.

⁴ At p. 297, *ante*.

⁵ Matrimonial Causes Act, 1937, s. 6.

⁶ *Wilkins v. Wilkins*, [1896] P. 108.

⁷ In *Eustace v. Eustace*, [1924] P. 45, 53.

⁸ *Eustace v. Eustace*, [1924], P. 45; *Christian v. Christian* [1897], 78 L.T.

86, 88.

monial Causes Act, 1937, Sect. 13, can be invoked in favour of the deserted wife.¹

(b) COMPETENCE OF THE COURTS OF RESIDENCE. The alternative jurisdiction of the courts of the place of residence of the respondent at the commencement of the suit is based both upon considerations of public policy and, as far as the English courts are concerned, upon statutory provisions.²

As regards the former ground, the courts of the place of residence have the duty of upholding the decencies of married life within their jurisdiction and are, therefore, competent to pronounce decrees which, like that of judicial separation or of restitution of conjugal rights, prominently serve that purpose without changing the personal status of the parties. The regulation of these consequences of matrimony is, like the maintenance of a deserted wife or police protection afforded against a cruel husband, a concern of the country where the parties live rather than of the country to which they belong. These considerations have been stated clearly in *Armtyage v. Armtyage*,³ a case decided in 1898.

In this case a wife, whose husband was domiciled in Australia but resided within the English jurisdiction at the institution of the suit, petitioned the Court for judicial separation on the ground of the cruelty of the husband. Only three years previously, in 1895, the exclusiveness of the test of domicile in divorce cases had been established by the Privy Council in *Le Mesurier v. Le Mesurier*.⁴

The Court was strongly pressed on behalf of the respondent to accept the same exclusive test for judicial separation, but rejected that argument and decided that the residence of the respondent at the commencement of the suit was sufficient to enable the court to exercise its jurisdiction.

Gorell Barnes, J., said: "It is against the repetition of apprehended acts of cruelty that the Court grants its protection, and, unless the Court interferes, there is nothing to prevent the husband from forcing himself upon his wife and placing her in a position in which she may be subjected to further acts of cruelty. The status of married persons within the country is recognised. Performance of the duties arising from the marriage tie should be required, and protection afforded against an abuse of the position resulting from that tie where necessary. Police protection is an inadequate remedy."

As regards the statutory basis of the jurisdiction of the English courts to pronounce a decree for judicial separation in case of residence of the respondent within the jurisdiction,⁵ it is sufficient to observe that such jurisdiction was undoubtedly exercised by the ecclesiastical

¹ See above, p. 317, and E. A. Phillips, *The Practice of the Divorce Division*, 3rd ed., 1939, 6-7.

² *Armtyage v. Armtyage*, [1898] P. 178; *Anghinelli v. Anghinelli*, [1918] P. 247. *Graham v. Graham*, [1923] P. 31; *Raeburn v. Raeburn* (1928), 44 T.L.R. 384.

³ [1898] P. 178.

⁴ [1895] A.C. 517.

⁵ See Filcher, J., in *Sim v. Sim*, [1944] P. 87; and p. 326, *ante*.

courts¹ when decreeing the so-called divorce *a mensa et thoro*, that it was transferred, by the Matrimonial Causes Act, 1857,² to the temporal courts and that it is now vested in the Probate, Divorce and Admiralty Division of the High Court³ and in the courts of summary jurisdiction.⁴ The English courts are, therefore, "bound by statute"⁵ to assume this jurisdiction.

English law will further, it is submitted,⁶ recognise a decree of judicial separation pronounced by a foreign court in whose jurisdiction the respondent resides at the commencement of the suit, even if the husband is domiciled in England. The reason for this apparent divergence from the rules governing nullity suits is that, in the case of judicial separation, the jurisdiction based on residence is founded, apart from status, on a juristic principle of general application, whilst, in the case of nullity, it is founded solely on statute.

Here again,⁷ the residence of the respondent, not of the petitioner, determines the jurisdiction of the court. Here, too, residence does not mean presence in the jurisdiction, and a person can be resident in the jurisdiction though travelling abroad.⁸ Thus, to give an imaginary example, the English courts would be competent to pronounce a judicial separation in the case of an Italian journalist who though retaining his Italian domicile resides with his wife in England as correspondent for an Italian newspaper, and is travelling at the time of the citation through Scandinavia.⁹ It is immaterial for the exercise of the jurisdiction where the misconduct complained of took place.¹⁰

B. Law applicable. The law applicable to a judicial separation is, it would appear, the *lex fori* of the court taking cognisance of the suit. If the courts of the domicile deal with the petition, they will decide the questions of substantive law according to their municipal law, and the same is true if the petition is submitted to the courts of residence.

5. PETITIONS FOR RESTITUTION OF CONJUGAL RIGHTS.

Petitions for restitution of conjugal rights are governed by the same principles as apply to judicial separation, both with respect to jurisdiction and substantive law.

¹ *Carden v. Carden* (1837), 1 Curt. 558.

² Ss. 6, 7, 22.

³ By virtue of the Judicature Act, 1925.

⁴ By virtue of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925.

⁵ *Per Swinfen Eady, M.R.*, in *Anghinelli v. Anghinelli*, [1918] P. 247, 254.

⁶ The lack of authority on this point is noted by Dicey, 5th ed., p. 426.

⁷ See p. 328, *ante*; *Sim v. Sim*, [1944] P. 87.

⁸ *Graham v. Graham*, [1923] P. 31; *Raeburn v. Raeburn* (1928), 44 T.L.R. 384.

⁹ *Armtyage v. Armtyage*, [1898] P. 178.

¹⁰ *Ward v. Ward* (1923), 39 T.L.R. 440.

The jurisdiction of the English courts in suits for the restitution of conjugal rights is, according to Sir Samuel Evans, P.,¹ exercisable if

either . . . the parties to the suit were domiciled in England at the time of the institution thereof;² or
 . . . they had a matrimonial home in England at the date when their cohabitation ceased; or
 . . . they were both resident in England at the time of the institution of the suit.

The jurisdiction of the foreign courts is probably co-extensive. If these requirements which can be reduced to the two principles of domicile or residence are not satisfied, the courts are not entitled to grant a decree for restitution of conjugal rights.³

6. APPLICATIONS FOR ANCILLARY RELIEF.

Applications for ancillary relief,⁴ such as alimony or maintenance of the wife, custody or maintenance of the children, secured provisions or settlements regarding the wife's property should, in principle, be obtained in the courts entertaining the matrimonial cause in question.⁵ Ancillary orders of foreign courts competent to take cognisance of the matrimonial cause itself should be recognised in the English courts unless infringing English public policy, and, conversely, the English courts are competent to make such orders if having jurisdiction to deal with the matrimonial cause itself.

The general jurisdiction of the English courts in applications for ancillary relief is supplemented by the Summary Jurisdiction (Married Women) Act, 1895, which provides, briefly,⁶ that any married woman whose husband

- (i) has been convicted of an assault upon her, or
 - (ii) has deserted her, or
 - (iii) has been guilty of persistent cruelty to her, or
 - (iv) has been guilty of wilful neglect to maintain her and the children, or
 - (v) whose husband is a habitual drunkard
- may apply to any court of summary jurisdiction within the petty

¹ *Perrin v. Perrin*, [1914] P. 135, 140; see also *Dicks v. Dicks*, [1899] P. 275, and *Bateman v. Bateman*, [1901] P. 136.

² In the case of the deserted wife the Matrimonial Causes Act, 1937, s. 13, applies, see p. 317, *ante*; see E. A. Phillips, *The Practice of the Divorce Division*, 3rd ed., 1939, 7.

³ Dicey, 5th ed., p. 291; *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; *Firebrace v. Firebrace* (1878), 4 P.D. 63; *Countess de Gasquet James v. Duke of Mecklenburg-Schwerin*, [1914] P. 53.

⁴ See Matrimonial Causes Rules, 1947, r. 3 (2); see also p. 320, *ante*.

⁵ See for the jurisdiction of the English courts: the Judicature Act, 1925, s. 190 *et seq.*; and Matrimonial Causes Rules, 1947.

⁶ For details see the current edition of Stone's *Justices' Manual*.

sessional district in which such conviction has taken place or the complaint has been committed,

for an order for maintenance or other ancillary relief. The Act extends the jurisdiction of the English courts as compared with their jurisdiction in matrimonial causes; an English petty sessional court has, e.g., jurisdiction, in the case of spouses domiciled in a foreign country but resident in England, to make a maintenance order for the wife though she can obtain a divorce only in the country of matrimonial domicil. The Act does not, however, dispense with the general requirements of jurisdiction in ordinary causes *in personam*,¹ and consequently an English petty sessional court has no jurisdiction to make a maintenance order under the Act if, at the time when the summons was issued, the husband was not present within the English jurisdiction though the wife was then resident therein.² Where, in the exercise of its statutory jurisdiction, a petty sessional court has made a maintenance order in favour of a wife whose matrimonial domicil is in a foreign country and the courts of that country have subsequently granted a divorce decree, it is within the discretion of the petty sessional court to discharge the order or not; normally the court will revoke the maintenance order, particularly if relief is available to the former wife in the foreign court.³

Maintenance orders made in some British dominions overseas may be registered in the English courts and are then enforceable in the United Kingdom.⁴ Further, a provisional maintenance order made by a competent court in those British dominions overseas may be confirmed by an English court of summary jurisdiction, and is then admitted to execution in the English jurisdiction.⁵ Conversely, the English courts may make provisional maintenance orders against persons residing in those British possessions overseas, and these orders are, upon due confirmation by the local courts, enforceable in those parts of the British Commonwealth.⁶

¹ *Forsyth v. Forsyth* (1948), 64 T.L.R. 17; these general requirements are explained on pp. 382-385; it would appear from the observations of Tucker, L.J., in *Forsyth v. Forsyth* that the jurisdiction of the petty sessional court cannot be founded on submission.

² *Forsyth v. Forsyth* (*supra*).

³ *Kirk v. Kirk*, [1947] 2 All E.R. 118; *Mesger v. Mesger*, [1937] P. 19; *Pastre v. Pastre*, [1930] P. 80; *Bragg v. Bragg*, [1925] P. 20.

⁴ Maintenance Orders (Facilities for Enforcement) Act, 1920, Sect. 1. The countries to which the Act has been extended are enumerated in the current edition of Stone's *Justices' Manual*.

⁵ *Ibid.*, Sect. 4.

⁶ *Ibid.*, Sect. 5.

CHAPTER XIII

THE STATUS OF THE CORPORATION *

I. GENERAL OBSERVATIONS

1. INCORPORATION CREATES A STATUS.

When analysing the status of the natural person, it was seen that status is a particular quality attributed by the law to some of the facts of life. Whether or not a set of facts constitutes a status is solely determined by the law, and, in so far, Professor Beale's statement that status is "a creature of the law and in that sense unreal and artificial,"¹ is correct. The same notion of status applies to the artificial person; here too the law attributes a particular character, i.e. the status of corporateness, to a certain state of facts, either to a combination of persons or, in the case of the corporation sole, to the holder of an office or dignity. "It is," as Foote observes,² "plainly only by a legal fiction that a corporate body, being an abstract and intangible creation of the law, can be regarded as a person at all."

From the status of corporateness follow several important consequences. The corporation may be the bearer of rights and duties; may conclude a contract, own land, commit a tort, or infringe a patent right; may sue and be sued; may be subject to taxation; and may become an alien enemy.

The fact that corporateness is a legal status, like marriage or legitimacy in relation to the individual, furnishes a clue for the ascertainment of the general principles underlying the English conflict of laws with respect to foreign corporations.

2. RECOGNITION OF THE FOREIGN CORPORATION.

Since English law recognises, in principle, every status created by foreign law unless that status is unknown to English municipal law,³ it is only logical that English law should recognise the corporate status of a foreign corporation. That it does so in fact has been stated by Lord Wright⁴ in the following passage—

* **For further reading:** A. Farnsworth, *The Residence and Domicil of Corporations*, London, 1939.

¹ 2 Beale, 649; *ante* at p. 269.

² Foote, 5th ed., p. 161.

³ See p. 269, *ante*.

⁴ In *Lazard Brothers & Co. v. Midland Bank*, [1933] A.C. 289, 297; the view of Lord Wrenbury in *Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112, 149, that the foreign corporation is considered, in this country, as a partnership is not in accordance with the other

English courts have long since recognised as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law.

A similar attitude is adopted by American law.¹

Whilst in modern English law the recognition of the foreign corporation is an undisputed fact, the juristic basis of such recognition is not equally certain. There exists a widespread belief that the recognition is accorded in furtherance of the comity of nations, and is accompanied by a tacit hope that foreign countries will reciprocate by recognising English corporations. This view is supported by Story,² Westlake³ and Foote⁴ and is alluded to in *Lazard Brothers v. Midland Bank*.⁵ It is submitted, with great deference to these authorities, that the recognition of a foreign corporation is not the result of some pious hope of reciprocity, but the logical outcome of the status character of corporateness, in conjunction with the rule that every foreign status is recognised by English law unless that status is unknown to English municipal law.

The rule that a foreign corporation is, in principle, recognised as such in English law, is, however, subject to a qualification that has its origin in the general rules relating to the classification and characterisation of the vested right which have been examined earlier.⁶ English municipal law classifies all kinds of combined trading into two groups, viz. the unincorporated type, which is illustrated by the partnership, and the incorporated type which is exemplified by the company limited by shares. There are, however, certain foreign associations (such as, for instance, foreign commercial partnerships possessing corporate status), which do not fall naturally into either of these two groups. In such a case, English law would first have to determine under which of the two groups the association is most appropriately to be classified,⁷ and only when it is found that the characteristics of the foreign association correspond, in essence, to those of the English corporation, will the corporate status of the foreign association be recognised by the English courts.

authorities (see *per* Lord Atkin in *Russian & English Bank v. Baring Bros.*, [1936] A.C. 405, 429; Dicey, 5th ed., p. 544).

¹ *Restatement*, Para. 154, p. 122; 2 Beale, 736, para. 154, 1.

² Story, s. 37.

³ Foote, 5th ed., p. 161.

⁴ See p. 34, *ante*; see Foote, 5th ed., p. 163: "It must, however, be taken subject to the qualification already referred to, that the foreign corporation, so called, must be something with the constitution and attributes of a body incorporated by English law."

⁵ *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 874; see p. 42, *ante*.

The fact, however, that the corporate nature of a foreign corporation is recognised in the English jurisdiction, does not imply that such a corporation is free to transact business in this country without restriction. The activities of foreign corporations can, without infringing the principle of recognition, be subjected to restrictions of an administrative character, similar in nature to those regulating the activities of individual aliens in this country. Such provisions are contained in the Companies Act, 1948, Part X, where it is, e.g., provided that "oversea companies", i.e. companies incorporated outside Great Britain and having an established place of business within Great Britain shall register with the Registrar of Companies certain particulars concerning their statutes and directors,¹ deliver to him annual balance sheets in the English language,² name a person resident in Great Britain who can be served with legal process,³ and state in all their publications the name of the company, the country where it is incorporated, and whether the liability of its members is limited.⁴ Another example of administrative regulations, which do not affect the recognition of the foreign corporation as such, is provided by the law of the State of Western Australia which prescribes that every foreign company trading in that State must keep a local register of shareholders at the registered office in the State;⁵ thus a company registered in the United Kingdom would be *obliged* to keep there the Dominions Register which by Sect. 119 of the United Kingdom Companies Act, 1948, it is *at liberty* to keep in any part of the British dominions outside Great Britain.

3. THE LAW APPLICABLE TO THE CORPORATION.

After these preliminary observations we are in a position to outline the law applicable to the activities of the corporation. Problems of three types have to be distinguished here.

First, all questions pertaining to the constitution of the corporation are, in principle, governed by the law of incorporation, i.e. the law of the state which created the artificial person. Under this category fall all questions relating to the creation or dissolution of the corporation or concerning its internal affairs. The view that the constitution of a corporation is, in all respects, governed by the law of incorporation is inevitable once it has been accepted that incorporation creates a status at law. It is fully accepted in English and American law,

¹ S. 407. ² S. 410. ³ S. 407. (1) (c); s. 412; see p. 350, *post*. ⁴ S. 411.

⁵ S. 347 of the Western Australia Companies Act, 1943. I am indebted for these particulars to Miss Enid Russell, Lecturer in Private International Law, University of Western Australia.

but more rigidly applied in the latter than in the former. Thus, according to American law, meetings of the shareholders must be held within the state of incorporation; ¹ all other corporate acts must, at least in principle, be done there; ² and the law of incorporation determines exclusively the alien enemy character of a corporation. ³ English law, however, does not accept the first two rules, and applies, in the third case, a different test, viz. the criterion of control. ⁴

Secondly, legal questions pertaining to the conflict of laws arise with respect to the (external) business of the corporation transacted in a country other than the country of incorporation. The legal intercourse of the corporation with third persons does not require special attention apart, perhaps, from the question of the powers of the corporation to transact the particular business, a question which, to some extent, depends on the constitution of the corporation.

The third class of problems which has to be considered is concerned with the adaptation, by means of interpretation, of legal rules which are based upon personal criteria such as nationality, domicile or residence, to the case of the artificial person.

This class of problem is of a very interesting character due to the fact that rules of law, originally laid down in relation to natural persons, have by analogy been adapted in relation to artificial persons and, in process of adaptation, inconsistencies have arisen. For example, a legislative enactment may contain regulations affecting natural persons, but omit provisions applying those regulations specifically to corporations; or a rule of law may depend on premises which, by their nature, are applicable only to natural but not to artificial persons. Thus the payment of income tax depends, in certain contingencies, on the *domicil* or *residence* of the recipient of the income. It is obvious that a corporation can no more have a domicile or residence than it can marry or have children. On the other hand, effect must be given to the legal prescript, which is clearly intended to cover the case of the artificial person as well as that of the natural person. Here the task of the courts is to interpret the enactment in question in relation to the artificial person. This has been stated by Baron Huddleston in the leading case of *Cesena Sulphur Co. v. Nicholson*⁵—

¹ *Miller v. Ewer* (1847), 27 Maine 509, 46 A.D. 619. ² 2 Beale, 753.

³ *Society for the Propagation of the Gospel v. Wheeler* (1814), 2 Gallison 105; *Fritz Schultz Co. v. Raines Co.* (1917), 164 N.Y. Sup. 454.

⁴ See p. 348, *post*.

⁵ (1876), 1 Ex. D. 428, 452; see further *per* Lord Sumner in *Egyptian Delta Land & Investment Co. v. Todd*, [1929] A.C. 1, 12; *per* Lord Halsbury in *American Thread Co. v. Joyce* (1913), 6 Tax Cases 163, 165; *per* Lord Parker in *Daimler Co. Ltd. v. Continental Tyre & Rubber Co.*, [1916] 2 A.C. 307, 339.

The whole question turns on the interpretation of "residence" as applicable to a company. . . . The use of the word "residence" is founded upon the habits of a natural man, and is therefore inapplicable to the artificial and legal person whom we call a corporation. But for the purpose of giving effect to the words of the legislature an artificial residence must be assigned to this artificial person, and one formed on the analogy of natural persons.

II. THE CONSTITUTION OF THE CORPORATION

1. THE CREATION OF THE CORPORATION.

The recognition of a foreign corporation by English law presupposes that the corporation has been validly created by the foreign law of incorporation. That legal system determines, in particular, the formalities upon which the association acquires corporate status in its own country. If it is shown that the corporation cannot claim corporate status in its own country, it cannot do so elsewhere.

Moreover, in order that an association of individuals should be recognised as a corporation by English law, it is necessary that the foreign government responsible for the incorporation of the association should be a government recognised by the government of this country. "A corporation created by a government not recognised by the Crown cannot be recognised as a corporation by the courts of this country."¹ It is not necessary that the government of the country incorporating the corporation should be acknowledged *de jure*, a *de facto* government is entitled to create or dissolve corporations which derive their corporate status from the law of the area under the control of that government.²

2. THE INTERNAL AFFAIRS OF THE CORPORATION.

The law of the country of incorporation governs also the internal affairs of the corporation, such as disputes between members or between members and the corporation,³ or disputes concerning the validity of resolutions passed at general or board meetings or the appointment and remuneration of the officers of the company. In this connection it is noteworthy that Erle, C.J., interrupted the argument of a case⁴ with the remark—

We make no inquiry as to the constitution of a foreign company,

¹ Lindley, *A Treatise on the Law of Companies*, 6th ed., 1902, Vol. 2, p. 1221; *City of Berne v. Bank of England* (1804), 9 Ves. 347.

² *Bank of Ethiopia v. National Bank of Egypt and Liguori*, [1937] 1 Ch. 513, 522; *Banco de Bilbao v. Sancha*, [1938] 2 K.B. 176, 195.

³ Westlake, 7th ed., p. 380.

⁴ *Branley v. South Eastern Railway Co.* (1862), 12 C.B. (N.S.) 63, 70.

any more than we should into the generation of an individual suing here.

And, in a case ¹ concerning the domestic affairs of a corporation incorporated under Turkish law, it was said from the Bench—

The association is created by the Sultan's *firman*, and regulated by statutes which were submitted to, and sanctioned by, the Turkish Government. . . . The rights of the members of the association as between themselves are, therefore, to be determined by the Turkish law.

3. THE DISSOLUTION OF THE CORPORATION.

A. General principles. The general principle governing the dissolution of the corporation has been stated by Lord Wright in *Lazard Brothers v. Midland Bank* ² as follows—

As the creation depends on the act of the foreign state which created them—i.e. corporation—the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which creates it can also destroy it.

How strictly the English courts apply the rule, that the dissolution of the corporation is determined by the law of incorporation, can be seen from the so-called *Russian Bank* cases which dealt with the liquidation of Imperial Russian trading companies by the Soviet Russian legislation. These companies which were engaged in banking, insurance or trade were incorporated under Imperial Russian law and carried on business in England through branch offices or without having established a permanent office. After the Bolshevik revolution, these companies were liquidated by the Soviet Government, and it appears from the evidence before the English courts that the liquidation was carried out in two stages; first, the companies were nationalised, their control and assets being taken over by the state, the members' shares in them being confiscated. Later, a formal dissolution, by means of a Soviet decree, followed. The issue before the courts in these cases was, whether the company concerned was capable of suing or being sued, a question which, in its turn, depended on the continued existence of the company as a separate legal entity. The test adopted by the English courts in all these cases was whether the company in question had been formally dissolved by the law of incorporation or not.³ This issue, like every question of foreign law, was

¹ *Pickering v. Stephenson* (1872), L.R. 14 Eq. 322, 339.

² [1933] A.C. 289, 297; see further "Corporations in Exile," 43 *Col. Law Review* (1943), 364.

³ The Soviet government was, at the time of the decisions, recognised either *de facto* or *de jure*.

purely a question of fact. Since in some cases¹ it was merely proved that by Soviet law the companies have been nationalised without losing their corporate status, the English courts regarded the companies as still existing in law and consequently as capable of being parties to legal proceedings. As was stated by Atkin, L.J., in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*²—

The control of the business which had been confiscated might as well be in the hands of a State department as of a State corporation, and might so continue consistently with the existence of the Bank as a juridical person.

In later cases³ it was proved that the companies in question were formally dissolved by Soviet legislation; and, in accordance with principle, the decision given was, that the companies (which had ceased to exist in law) had no *locus standi* in the English courts.⁴

B. Winding up of an English branch of a foreign company. The principle that the dissolution of a corporation is determined by the law of the country of incorporation is, for practical reasons, modified by the operation of the Companies Act, 1948, Sect. 399.⁵ The section provides, in general, for the winding up of "unregistered companies." This term includes foreign corporations which have been dissolved by their law of incorporation.⁶ According to Sect. 399 (5),⁷ the

¹ *Russian Commercial & Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; *Employers' Liability Corporation v. Sedgwick, Collins & Co.*, [1927] A.C. 95; *Banque Internationale de Commerce de Petrograd v. Goukassow*, [1925] A.C. 150; *The Jupiter* (No. 3), [1927] P. 122, 143; *Sabatier v. Trading Co.*, [1927] 1 Ch. 495.

² In a dissenting judgment that was, on reversal of the decision of the Court of Appeal, approved by the House of Lords, [1923] 2 K.B. 630, 670.

³ *Lazard Brothers & Co. v. Midland Bank*, [1937] A.C. 289; *Lazard Brothers & Co. v. Banque Industrielle de Moscou*, [1932] 1 K.B. 617; *Russian & English Bank v. Baring Brothers & Co. Ltd.*, [1936] A.C. 405; *Re Russian & English Bank*, [1932] 1 Ch. 663; *Re Russian Bank for Foreign Trade*, [1933] 1 Ch. 745.

⁴ In these cases, the courts have to examine the effect of the dissolution of a foreign company in the English jurisdiction. No issue pertaining to the conflict of laws is raised where the courts have to decide whether an English company that has its foreign property confiscated, should be wound up because it lost its substratum (*In re Baku Consolidated Oilfields, Ltd.*; (1944), 88 Sol. J. 84).

⁵ Sections 399 and 400 of the Act of 1948 are identical with section 338 of the Companies Act, 1929, which was in force when the cases referred to in this paragraph were decided.

⁶ Lord Maugham in *Russian & English Bank v. Baring Brothers & Co. Ltd.*, [1936] A.C. 405, 441; Slessor, L.J., *ibid.*, [1935] 1 Ch. 120, 131; Bennett, J., in *Re Russian & English Bank*, [1932] 1 Ch. 663, 668; further *Re Matheson Bros. Ltd.* (1884), 27 Ch. D. 225.

⁷ The English Courts exercise jurisdiction under Sect. 399 if the foreign company is "resident" in England for purposes of jurisdiction (see p. 350, *post*). The business of the company need not be carried on at an "established place of business," *In re Tovarishestvo Manufaktur Liudvig Rabenok* (1944), 60 T.L.R. 467. Service of the winding-up petition is effected at the principal place of business within the United Kingdom, *In re Naamloose Vennootschap Handelsmaatschappij Wokar*, (1946), 174 L.T. 101.

English affairs of an "unregistered company" can be wound up—

- (i) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purposes of winding up its affairs ;
- (ii) if the company is unable to pay its debts ; or
- (iii) if the court is of opinion that it is just and equitable that the company should be wound up.

Sect. 400 places it beyond doubt that the Court of Chancery has jurisdiction to order the winding up of the foreign corporation though the corporation by the law of the country of its incorporation has not been formally dissolved, but, as in some of the *Russian Bank*¹ cases, has merely become defunct. The section provides—

Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this Part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

These provisions are undoubtedly expedient and necessary for the protection of the English creditors of foreign corporations, but, from the point of view of theory, they are anomalous in so far as they prescribe, for the purposes of the English winding up, the continued existence of an artificial person, which by its dissolution under the law of incorporation has become extinct. In practice, however, the spectral existence of a dissolved foreign corporation during the winding up of its English affairs does not lead to difficulties in the ordinary non-litigious course of the winding up which is similar in nature to the bankruptcy of a natural person. In the rare case of a liquidator being compelled to resort to litigation, e.g., against a debtor who disputes the claim of the company, the question may arise whether a dissolved foreign corporation, which ordinarily has no *locus standi* in the English courts, can, if subject to a winding up order under Sect. 400, be a party to proceedings in an English Court. It would then be necessary to establish the juristic grounds on which the capacity of the corporation to take proceedings could be based. Would the appropriate ground be that the company had been "revived" ; or that it had never lost its corporate character in the English jurisdiction until after the winding up under Sect. 400 ; or that it had merely, by way of legal fiction, to be imagined as still in existence during the winding up proceedings ? These questions have been ventilated but not given a unanimous answer by the House of Lords in *Russian & English Bank v. Baring Brothers & Co., Ltd.*²

¹ See *ante*, p. 340, (n) 1.

² [1936] A.C. 405.

In this case, the Russian and English Bank which was incorporated under Imperial Russian law and carried on business in England had been dissolved by the Soviet legislation.

After the date of dissolution, the English branch of the Bank claimed considerable sums from Messrs. Baring Brothers, the defendants, who disputed the claim. An action of the Bank for recovery of these sums was stayed by the Court. Thereupon, a winding up order under Sect. 338 (1) of the Companies Act, 1929,¹ was made with regard to the plaintiff Bank, and the liquidator resuming the original action, applied to the Court to remove the stay. This motion was opposed by the defendants.

The point in issue was whether the bank, as a foreign company dissolved by the law of the country of its incorporation but in the process of being wound up in England, could be a party to litigation in an English court. Their Lordships decided by a majority (Lord Blanesburgh, Lord Atkin and Lord Macmillan) that the action was maintainable, whilst Lord Russell and Lord Maugham dissented.

The members of the majority did not base their opinion on the same grounds.

Lord Blanesburgh and Lord Macmillan held that Sect. 338 of the Companies Act, 1929,¹ in conjunction with certain other sections, had to be interpreted as meaning that the dissolved company, without being restored to life, should by means of a legal fiction be treated as still alive. This view is expressed in the following observations of Lord Macmillan :² "A legal system which for so long admitted as suitors in its courts those wholly fictitious persons John Doe and Richard Roe, who were in much worse case than the Russian and English Bank, for they never existed at all, might be expected to suffer with equanimity the apparition, at the bidding of the Legislature, of a dissolved company as a plaintiff."

Lord Atkin held³ that the foreign company had never ceased to exist within the English jurisdiction and for the purposes of the winding up. "This does not appear to me to be re-creating or reconstituting a new corporation ; it is for particular and limited purposes refusing to recognise the dissolution of the old."

The view of Lord Atkin, it may be said with great respect, is difficult to reconcile with the principle of the recognition in English law of the corporate status of a foreign corporation. A corporation either exists or is non-existent as a legal entity, but it is hard to conceive of an otherwise non-existent corporation continuing in existence in a particular jurisdiction and for a special purpose. The other view of the majority, viz., that by way of legal fiction the dissolved foreign company is to be treated as still in existence, and, therefore, as capable of being a party to an English litigation, does not conflict with the status theory.

III. THE POWERS OF THE CORPORATION

Turning now to an examination of the law applicable to the external business of the corporation, only three points require mention here,

¹ Which is identical in terms with sect. 399 of the Companies Act, 1948.

² At p. 438.

³ At p. 428.

as the artificial person is, in this respect, subject generally to the same legal considerations as the natural person.

1. THE CAPACITY OF THE CORPORATION TO TRANSACT BUSINESS.

The rules relating to the capacity of a corporation to transact business in a jurisdiction other than that of its incorporation can be stated as follows—

- (a) In principle, the law of the country of incorporation determines the capacity of a corporation to enter into a legal transaction.
- (b) This principle is subject to one qualification, viz., that the law of the country where the transaction occurs may limit or prohibit the exercise of the corporate powers of the corporation.

This statement requires elucidation. The principle that the powers of a corporation are a corporate incident, which, as such, is governed by the law of the country of incorporation, is, it appears, firmly established in English law.¹ The capacity of the corporation to transact business cannot be altered by a law other than that of the country of incorporation. But every state is at liberty, at the same time as it recognises a foreign corporation, to curtail within its territory the activities of that corporation, or, in other words, to limit the *exercise* within its territory of the powers of the corporation. This distinction is clearly drawn in American law and applies, it is believed, equally in English law. Professor Beale² has thus formulated the distinction—

Since the determination of the powers of a corporation is inherent in the very nature of the corporation, its powers cannot be altered by any other state. While the law of another state may permit or forbid the exercise of corporate powers, it cannot increase or diminish the powers themselves, or in any way affect their existence.

The law of the state where a particular transaction relating to a foreign corporation occurs may very well restrict the exercise of the powers of that corporation if such exercise contravenes the public policy of that state. Thus, the English Mortmain Acts or similar legislation preventing corporations from holding land apply to a foreign as well as to an English corporation, though the foreign corporation, by the law of the country of its incorporation, may be empowered

¹ *Risdon Iron and Locomotive Works v. Furness*, [1906] 1 K.B. 49; Scrutton, L.J., *obiter*, in *Banque Internationale de Commerce de Petrograd v. Goukassow*, [1923] 2 K.B. 682, 691.

² 2 Beale, 758.

to acquire and hold land.¹ Although the law of the place where a particular transaction occurs may restrict or even prohibit the exercise, within its jurisdiction, of the powers of a foreign corporation, that law cannot enlarge those powers, since such enlargement would effect an intrinsic change in the constitution of the corporation, a matter which would fall exclusively within the competence of the law of the country of incorporation.

2. THE RIGHT OF THE CORPORATION TO SUE AND TO BE SUED.

The right of foreign corporations to appear as plaintiffs² or defendants³ before the English courts has long been established. Historically, the modern doctrine of the recognition of the foreign corporate status originated in the practice of admitting as parties to English litigation corporations incorporated in foreign countries.

3. THE PERSONAL LIABILITY OF THE MEMBERS OF THE CORPORATION.

It follows from the recognition in English law of the separate legal personality of the foreign corporation that the members of a foreign corporation are not liable for the debts incurred by the agents of the corporation in the corporate name and style, unless, of course, the law of the country of incorporation provides otherwise. The limited liability of the shareholders of the foreign equivalent to the English company limited by shares⁴ is consequently fully recognised by English law. The liability of the members towards the corporation itself, e.g. for the payment of the subscription on the shares is, as a constitutional incident, governed by the law of the country of incorporation.

It should, however, be noted that, in particular circumstances, the shareholders of a foreign company may be held personally liable to an unlimited extent. The directors or other representatives of the company may incur a liability not only as the agents of the company, but also as the agents of the incorporators. In such a case the shareholders would be liable without limit to the creditor on the personal

¹ *Great West Saddlery Company Ltd. v. R.*, [1921] 2 A.C. 91, 100, 115; *Bonanza Creek Gold Mining Co. Ltd. v. R.*, [1916] 1 A.C. 566; *Chaudière Gold Mining Company of Boston v. Desbarats* (1873), L.R. 5 P.C. 277.

² *Dutch West India Co. v. Henriques* (1724), 1 St. 612; *Henriques v. Dutch West India Co.* (1730), 2 Ld. Ray. 1535.

³ *Tugate v. Austrian Lloyd's* (1858), 4 C.B. (N.S.) 704, 709.

⁴ "Société anonyme" and "société avec responsabilité limitée" in French law and "Aktiengesellschaft" and "Gesellschaft mit beschränkter Haftung" in German law.

contract, and not as members of the company. The courts will not readily infer the existence of a personal bond between the creditor and the corporators, and the burden of proof required to show that the directors acted as agents of the members of the company is a heavy one.¹

IV. RULES OF INTERPRETATION RELATING TO THE CORPORATION

1. GENERAL OBSERVATIONS.

As regards the third class of problems, our task is to ascertain the facts in corporate life which are analogous to the nationality, domicile or residence of an individual.²

2. THE "NATIONALITY" OF THE CORPORATION.

The "nationality" of a corporation is determined by the law of the country of incorporation.³ This view is supported by the Treaty of Peace with Germany Order, 1919,⁴ Art. 2, which provides that the expression "nationals" in that order in relation to a particular state includes corporations incorporated in that state. In English municipal law, nationality is rarely adopted as a legal test. The most important case where it has been applied is the Merchant Shipping Act, 1894,⁵ which provides that only British subjects are qualified to own a British ship. The Act does not render it necessary to define the analogous criterion to British nationality for the case of a corporation because the Act provides expressly⁶ for this contingency by stating that a British ship can be owned by

bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business⁷ in these dominions.

3. THE "DOMICIL" OF THE CORPORATION.

The necessity seldom arises for the ascertainment of the corporate facts corresponding to the "domicil" of an individual.

In English tax law, however, it is conceivable that the courts might be asked to determine the "domicil" of an artificial person.

¹ *Risdon Iron & Locomotive Works v. Furness*, [1906] 1 K.B. 49.

² See p. 337, *ante*.

³ *Per* Macnaghten, J., in *Gasque v. Commissioners of Inland Revenue*, [1940] 2 K.B. 80, 84; A. Farnsworth, *op. cit.*, 298; R. E. L. Vaughan-Williams and M. Crussachi, "The Nationality of Corporations," in 49 *L.Q.R.* (1933), 334.

⁴ S.R. & O., 1919, 1517.

⁵ S. 1 (a) (b) (c).

⁶ S. 1 (d).

⁷ What "principal place of business" means, is explained at p. 353, (n) 4, *post*.

The Income Tax Act, 1918,¹ provides that all persons ordinarily resident in the United Kingdom are liable to income tax in respect of income arising out of the United Kingdom, whether it has been remitted to the United Kingdom or not, but that residents who are not domiciled in the United Kingdom need not pay tax on certain kinds of income earned abroad and *not* remitted to the United Kingdom;² the question is, then, in what circumstances a company is to be regarded as "domiciled" abroad in order to be entitled to relief with respect to its foreign unremitted income. Further, in order to prevent the evasion of taxes by transfer of property out of the United Kingdom, it is provided by the Finance Act, 1936,³ that, where an individual ordinarily resident within the United Kingdom has power to enjoy the income of "a person resident or domiciled out of the United Kingdom," and such income would be taxable if it were received within the United Kingdom, the income is deemed, for the purposes of the Income Tax Acts, the income of that individual. In this case the Income Tax Commissioners will try to establish that a company incorporated abroad and controlled by shareholders who are ordinarily resident within the United Kingdom, is to be regarded as being domiciled out of the United Kingdom because in that case the United Kingdom income of the company is taxable as income of the shareholders.⁴

It was held by Macnaghten, J., in *Gasque v. Inland Revenue Commissioners*,⁴ that the place of incorporation is equivalent to the domicile of origin of an individual.

However, the real problem is whether a corporation, like an individual, can have a domicile of choice, i.e., whether it can be "domiciled" in a country other than that of its incorporation. Dicey⁵ maintains that this is feasible, and that the "domicile of choice" of the corporation is at the place where its central management and controlling power abide. Dr. Farnsworth opposes this view and holds that it is impossible to attribute a "domicile of choice" to a corporation because, "if such a domicile could be obtained, this would give a corporation a status or personal law different from that which it possessed in actual law."⁶ The view of the learned author is supported by a *dictum*

¹ Schedule D, Case IV, rule 2a, and Case V, rule 3a.

² A. Farnsworth, *op. cit.*, 201-75; and A. Goldstein on "The residence and Domicile of Corporation with special reference to Income Tax" (1935), 51 *L.Q.R.* 684, 694.

³ Sect. 18.

⁴ *Gasque v. Inland Revenue Commissioners*, [1940] 2 K.B. 80.

⁵ Dicey, 5th ed., Rule 19, p. 136.

⁶ A. Farnsworth, *op. cit.*, 217; see also Cheshire, 3rd ed., 253, and A. Goldstein, *loc. cit.*, 696.

of Macnaghten, J., in *Gasque v. Inland Revenue Commissioners*¹—

The domicile of origin, or the domicile of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence.

In the result, it appears that a corporation, unlike an individual, cannot have a domicile of choice.

4. THE "RESIDENCE" OF THE CORPORATION.

A question of great practical importance is the determination of the incidents in the life of the corporation which are analogous to the "residence" of a natural person. It would be vain to attempt to establish a universal test of "residence" of a corporation, as is indicated by Lord Loreburn in *De Beers Consolidated Mines Ltd. v. Howe*²—

I will merely add that I agree with the Master of the Rolls that residence of a company within the meaning of the Income Tax Acts is not necessarily the same thing as residence for the purpose of serving a writ.

Our task is, in fact, to examine separately the three legal problems where the question of residence of a corporation arises. These problems relate to the law of taxation, the jurisdiction of the courts and the attribution to a corporation of the character of an alien enemy.

A. For purposes of taxation. In English tax law, the payment of taxes by a person often depends on his ordinary residence.³ Under the Income Tax Act, 1918, Schedule D, Cases IV and V⁴ a person ordinarily resident in the United Kingdom and not being domiciled abroad has to pay tax with respect to income arising from property situated abroad, whether the income has been remitted to the United Kingdom or not. The Act provides further that if a British subject is not ordinarily resident in the United Kingdom, no tax becomes due on income earned abroad unless it is remitted to the United Kingdom. These provisions give rise to two problems, viz., whether a British corporation engaged in business abroad is chargeable with respect to unremitted income earned abroad, and secondly, whether a corporation incorporated abroad and engaged in trade in the United

¹ *Ibid.*, at p. 84.

² [1906] A.C. 455, 459.

³ The expression "ordinary residence" "differs little in meaning from the word 'residence' as used in the Acts"; *per* Viscount Cave, L.C., in *Levene v. Inland Revenue Commissioners*, [1928] A.C. 217, 225; *Inland Revenue Commissioners v. Lysaght*, [1928] A.C. 234; Konstam, *Law of Income Tax*, 10th ed., 1946, 221.—"The converse of 'ordinary residence' is 'occasional residence.'"

⁴ Schedule D, Case IV, rule 2a and Case V, rule 3a. An enactment involving similar problems was the Finance (No. 2) Act, 1939, which provided for an Excess Profit Tax; see s. 12 (2) of the Act.

Kingdom has to pay British tax with respect to the income earned abroad and not remitted to the United Kingdom. In both instances the answer depends on whether the corporation is ordinarily resident in the United Kingdom.

It is a well-established rule that, for the purposes of tax legislation, a corporation is ordinarily resident where the real business of the corporation is carried on.¹ The determination of the place or places where that amount of business is carried on is a question of fact "to be determined upon a scrutiny of the course of business and trading." Since 1876, when the famous case of *Cesena Sulphur Co., Ltd. v. Nicholson*² was decided, this principle has never been seriously doubted in English law. In that case, Baron Huddleston, when rejecting the argument of the Attorney-General that the registration of a company conclusively determines its "residence," observed³—

Drawing an analogy between a natural and an artificial person, you may say that in the case of a corporation the place of its registration is the place of its birth, and is a fact to be considered with all the others. . . . But I do not think that the principle of law is really disputed that the artificial residence which must be assigned to the artificial person called a corporation is the place where the real business is carried on.

In order to determine whether the corporation transacts "real business" at a certain place, all relevant circumstances have to be examined. The place of registration of the corporation, the situation of the chief seat of control and management of the corporation, the amount of commercial business transacted, the place of administration of the company's internal affairs, are incidents important for that examination though none of them is conclusive by itself. It is the combination of these incidents which determines the place of real business. This is illustrated by the varying weight attributed by the courts to the situation of the chief seat of control and management of the corporation. In cases where a corporation is registered abroad and transacts actual business abroad, the English courts are inclined to regard the corporation as resident in the United Kingdom only if the chief seat of control is situated in the United Kingdom.⁴ Only corporations satisfying that test have, therefore, to pay British Income Tax on income earned abroad and not remitted to the United Kingdom

¹ *De Beers Consolidated Mines Ltd. v. Howe*, [1906] A.C. 455; *Egyptian Hotels Ltd. v. Mitchell*, [1915] A.C. 1022; *American Thread Co. v. Joyce* (1913), 29 T.L.R. 266; *New Zealand Shipping Co. Ltd. v. Thew* (1925), 8 Tax-Cas. 208.

² (1876), L.R. 1 Ex.D. 428.

³ At pp. 453, 454.

⁴ *Goers & Co. v. Bell*, [1904] 2 K.B. 136.

whilst a corporation registered abroad which merely trades in the United Kingdom and is controlled from abroad would be chargeable only on the income earned in the United Kingdom.¹ On the other hand, in the case of a corporation registered in Great Britain a smaller amount of actual business is required to support the assumption that the corporation is resident in Great Britain, and this conclusion is already justified if some actual business of a commercial or administrative character is transacted here although the chief seat of management is situate in a foreign country.²

Since a company can transact real business in several countries at the same time, it may, like an individual, have a dual residence in law. This result would be unattainable if the chief seat of management and control were the conclusive and not merely an indicative fact in the determination of the corporate residence, since logically a corporation can have only one chief seat of control.³ The rule that, for income tax purposes, a corporation may have dual residence, was established in *Swedish Central Railway Co. v. Thompson*.⁴

In this case, a company incorporated under English law had as its object the construction and management of a railway in Sweden. The control and chief seat of management of the company was in Sweden, where the head office was situate, the board meetings were held and the dividends declared. In London, the secretary of the company resided, the seal of the company and the transfer books were kept, and a committee of directors met regularly in order to deal with transfers of shares; further, a banking account was maintained there, and the accounts of the company were made up and audited there.

On these facts the House of Lords (Viscount Cave, L.C., Lord Dunedin, Lord Sumner, Lord Buckmaster, Lord Atkinson (dissenting)) held that the company resided both in England and Sweden, and was, therefore, liable to English income tax on the income earned in Sweden but not remitted to England.

Though, for the determination of the place or places of residence of the corporation, the administrative business is as important as are the commercial activities, the mere compliance with the minimum requirements of the Companies Act for the registration of companies registered under the Act is not sufficient in itself to establish the fact that "real business" is done in this country. This was decided, likewise by the House of Lords, in *Egyptian Delta Land and Investment Company Ltd. v. Todd*,⁵ where Lord Sumner said⁶ that, if a company

¹ *A.G. v. Alexander* (1875), L.R. 10 Ex. 20.

² *Swedish Central Railway Co. v. Thompson*, [1925] A.C. 495.

³ Lord Atkinson in *Swedish Central Railway Co. v. Thompson*, [1925] A.C. 495, 508; see p. 354, *post*.

⁴ [1925] A.C. 495.

⁵ [1929] A.C. 1.

⁶ At p. 15.

"has no place of trade here and does nothing at its head office than the minimum and occasional formalities required by the Act, it is surely an impossible straining of plain words to call that its 'ordinary residence'." The facts in the *Egyptian Delta* case should be carefully compared with those in the *Swedish Central Railway* case, because though the difference in facts is slender, the practical consequences may be great.¹

The Egyptian Delta Land and Investment Company² was incorporated under English law for the object of acquiring and developing land situate in Egypt. The business of the company was entirely managed and controlled from Cairo. There, the directors and secretary permanently resided, the seal, minutes and books of accounts and transfer were kept, transfers were approved (before being registered in the statutory book in London), and dividend was declared and paid. In London, a gentleman carrying on the profession of a secretary of public companies provided, for a small fee, a registered office for the company in his own rooms where five other companies had their names on the door, and kept the statutory books. No separate room or part of a room was allotted to the company. A banking account not exceeding £9 was kept in London for small disbursements, and no cheques were drawn thereon.

The House of Lords held that, on these facts, the company was ordinarily resident in Egypt, and not in the United Kingdom.

B. For purposes of jurisdiction. For the purposes of jurisdiction, the test of "residence" of a corporation is to-day less important than previously, the Companies Act, 1948, having laid down a number of special provisions dealing with the service of legal process in the case of English and foreign corporations.

No difficulty arises in the case of a British company incorporated by registration under the Act because such a company must, from the day on which it commences business, have a registered office within the jurisdiction where it can be served with legal process³ whether or not it carries on business in this country.

A foreign company, on the other hand, when establishing a place of business within Great Britain⁴ must, under Part X of the Act of 1948, name a person authorised to accept service of legal process, and such service⁵ is, according to Sect. 412 of the Act, effective as against the foreign company. A company has established a place of business within Great Britain if it has fixed a more or less permanent place of business here, such as a branch office or a share transfer or registration office;⁶ but this requirement is not satisfied if it transacts business

¹ A useful synopsis of the facts of the two cases will be found in Farnsworth, *op. cit.*, p. 107.

² The facts are taken from the *Law Reports*, pp. 2-3.

³ S. 470 (1); for Scottish companies, see s. 470 (2) and (3).

⁴ Such a company is called an "oversea company" in the Act (s. 406); see p. 336, *ante*.

⁵ Or some kind of substituted service, see s. 412.

⁶ S. 415.

here only by means of an agent. It has, further, been held that a foreign company, by filing with the Registrar of Companies the name of a person authorised to accept service, "submits voluntarily to the jurisdiction of the English courts, and on this account cannot subsequently be heard to object to such jurisdiction."¹

Foreign companies may, however, transact business within the jurisdiction without "establishing a place of business" therein. These companies (or foreign corporate bodies which are not trading companies at all) do not come under Part X of the Act of 1948, and the facilities of Sect. 412 of the Act are, therefore, not available against them. Such a corporation can, however, be served under O. 9, r. 8 of the Rules of the Supreme Court, 1883, if it carries on business within the jurisdiction and a head officer² of the corporation is within the jurisdiction on whom the writ or other legal process can be served. This rule is of great practical value if it is intended to sue a foreign corporation transacting business in this country by means of an agent. The requirements of the rule have been explained by Buckley, L.J.:³

First, the acts relied on as showing that the corporation is carrying on business in this country must have continued for a sufficiently substantial period of time.⁴ . . . Next, it is essential that these acts should have been done at some fixed place of business. . . . The third essential, and one which it is always more difficult to satisfy, is that the corporation must be "here" by a person who carries on business for the corporation in this country. It is not enough to shew that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country.

In practice, the third of Lord Justice Buckley's criteria is the really crucial one. No service will have effect against the foreign corporation if it is made merely on a representative who acts as an independent contractor, who, e.g., buys from the corporation in his own name and re-sells the goods in the same manner, because he transacts, in law, his own and not the corporation's business.⁵ On the other hand, where business is carried on by an agent in the technical

¹ Lord Parmoor in *Employer's Liability Assurance Corp. v. Sedwick, Collins & Co.*, [1927] A.C. 95, 115; *The Madrid*, [1927] P. 40, 45.

² Or another higher official of the corporation (see the enumeration in R.S.C., O. 9, r. 8).

³ In *Okura & Co. Ltd. v. Forsbachs Yernverks Aktiebolag*, [1914] 1 K.B. 715, 718.

⁴ This requirement is easily satisfied; in *Dunlop Pneumatic Tyre Co. v. A.G. für Motor-und Motorfahrzeugbau*, [1902] 1 K.B. 342, a nine days' period has been held sufficient.

⁵ *Dunlop Pneumatic Tyre Co. v. A.G. für Motor-und Motorfahrzeugbau*, [1902] 1 K.B. 342, 347; *Newby v. Von Oppen* (1872), 7 Q.B. 293; *In re Tovari-shestvo Manufactur Ludvig Rabenek* (1944), 60 T.L.R. 467.

legal meaning, such an agent will not in all cases be in the position of a "head officer." If, e.g., the agent has no discretion to undertake engagements on behalf of the principal, or if the agent has only to submit orders to the principal and to await the principal's instructions, the business is not carried on here "by a person but *through* a person" and no service here is possible.¹ It depends, therefore, on the circumstances of the case and, in particular, on the authority of the agent whether he can or cannot be served with process against the foreign corporation.²

It is evident from these observations that in some circumstances a foreign corporation engaged in trading in this country cannot be served with legal process *within* the jurisdiction. In these instances, the question is whether the facts of the case can be brought under one of the cases of Order 11 which is also applicable to corporations,³ and, if so, service out of the jurisdiction may be permitted by the Court.

Finally, the converse question may arise whether an English company⁴ trading in a foreign country is resident there so as to entitle the courts of that country to exercise jurisdiction over it. It is only in such a case of residence that English law considers the courts of a foreign country as competent to adjudicate upon the company unless the latter has submitted to the jurisdiction of the foreign court. It has been decided in *Littauer Glove Corporation v. F. W. Millington (1920) Ltd.*,⁵ that a company is resident in a foreign jurisdiction only if it carries on business there "at a definite and, to some reasonable extent, permanent place" but that no residence can be inferred from the presence of the company's travellers in, or from an occasional visit of its director to, the foreign country in question.

C. For the attribution of the character of an enemy alien. The third case where the residence of a corporation has to be considered arises in connection with the definition of an alien enemy. At a later stage when the rules concerning alien enemies are explained in detail,

¹ *Okura & Co. Ltd. v. Forsbachs Jernverks Aktiebolag*, [1914] 1 K.B. 715, 721.

² In addition to the cases mentioned in the preceding footnotes: *Saccharin Corp. Ltd. v. Chemische Fabrik von Heyden A.G.*, [1911] 2 K.B. 516; *Thames and Mersey Marine Ins. Co. v. Lloyd Austriaco* (1914), 30 T.L.R. 475; *The Lalandia* (1932), 49 T.L.R. 69.

³ O. 71, r. 1; "ordinarily resident" in the meaning of O. 11, r. 1 (c) refers to the place where the chief office of the corporation is situate (*Jones v. Scottish Accident Insurance Co.* (1886), 17 Q.B.D. 421, 422). See p. 392, *post*.

⁴ Or a company incorporated in a third country.

⁵ (1928), 44 T.L.R. 746.

the two cases in which a corporation may be regarded as an alien enemy¹ will be described. For our present purpose it is sufficient to deal with the following aspect of the problem.

In the case of natural persons the test of an alien enemy is voluntary residence within the jurisdiction of the enemy state, nationality and domicile being irrelevant in this connection.² It has, therefore, to be ascertained what, in the case of an artificial person, is "the analogue to voluntary residence among the King's enemies." The answer has been given by Lord Parker in *Daimler Co. Ltd. v. Continental Tyre and Rubber Ltd.*³ in the following terms—

I think that the analogy is to be found in control, an idea which, if not familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitely with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character.

And Bargrave Deane, J.,⁴ when determining a similar issue observed—

The cases come to this that to decide the true character and entity of a business or company you must ascertain where the motive or directing force of the business or company comes from; in other words, where the real life is, and not where the limbs move to give effect to that living motive power.

In the case of alien enemy corporations, English Common Law has, therefore, accepted the tests of control, a rule similar to the *siège social* theory prevailing in some continental countries.⁵ In the United States, on the other hand, the alien enemy character of a corporation is solely determined by the law of the country of incorporation. In the result, the English courts would regard as an alien enemy a corporation incorporated under English law but controlled by an enemy individual, whereas the American courts would in no circumstances

¹ See p. 406, *post*.

² See p. 405, *post*.

³ [1916] 2 A.C. 307, 339; see also *Re Hilches, Ex parte Muhesa Rubber Plantations Ltd.*, [1917] 1 K.B. 48; *V/O Soufracht v. Gebr. van Udens Scheepvaart en Agentuur Maatschappij*, [1943] A.C. 203, *The Pamia*, [1943] 112 L.J. P.D.A. 34; *The Glenroy*, [1945] A.C. 124, 137.

⁴ *The Polzeath*, [1916] P. 117, 122; this case was concerned with the interpretation of the term "principal place of business" as occurring in the Merchant Shipping Act, 1894, s. 1 (d) (*ante*, at p. 345); see also *The St. Tudno*, [1916] P. 291.

⁵ Westlake, 7th ed., p. 381; (1915), Clunet, p. 1164.

attach that character to a corporation incorporated under American law.¹

It is a noteworthy result that, in English law, the test of residence of a corporation is not the same in the cases of taxation and alien enemy character. For the purposes of taxation, a corporation is resident where it carries on "real business," a criterion admitting the possibility of a dual residence.² The alien enemy character of a corporation is determined alone by the place of the actual control of the affairs of the corporation, a criterion excluding the possibility of a dual residence.

¹ *Fritz Schultz Co. v. Raines Co.* (1917), 164 N.Y. Sup. 454.

² See p. 349, *ante*.

PART III: JURISDICTION

CHAPTER XIV

THE LAW OF PROCEDURE *

I. THE DOMAIN OF THE *LEX FORI*

1. GENERAL OBSERVATIONS.

After a right has been duly defined and connected, and thereby established as a vested right, it requires enforcement—a step which is of no less practical importance than the existence of the right itself. The enforcement of a vested right extends over a number of stages which usually begin with the issue of a writ and end with the execution of the judgment of a competent court. The enforcement of a right thus depends on the submission of the plaintiff's claim to a court of competent jurisdiction, on the compliance with the rules determining the practice of that court, on the due assessment of damages, and finally on the modalities of execution of the decision of the court.

In the conflict of laws, the problem of the enforcement of a vested right presents itself in a particular form, since the place where the enforcement is sought differs from that under the law of which the right has been acquired. The conflictual rules on the enforcement of a vested right concern, therefore, either the enforcement in the English courts of a right vested under some foreign system of law, or the enforcement in the courts of a foreign country of a right acquired under English law. It is thus one of our principal tasks to ascertain the circumstances in which the English and foreign courts are competent to exercise jurisdiction in these cases—a question that will be considered in the ensuing chapters. The present chapter is devoted to the discussion of those rules of the conflict of laws which govern the procedure in court and which, on principle, are equally applicable to English and foreign proceedings.

The enforcement of a vested right in a jurisdiction other than the jurisdiction where the right originated raises an apparent doctrinal difficulty. The view has been expressed that a vested right is, in

* For further reading : A. Mendelssohn-Bartholdi, "Delimitation of Right and Remedy in the Cases of the Conflict of Laws," 16 *B.Y.B.I.L.* (1935), 20 ; E. H. Ailes, "Substance and Procedure in the Conflict of Laws," 39 *Michigan Law Review* (1941), 392.

all respects, including the incidents of its enforcement, governed by the law under which it has been created (*lex causæ*). The supporters of this view argue that otherwise the substance of the right would be affected because the quality of the right is inevitably altered if the right is enforced in a manner differing from that provided by the *lex causæ*. A distinguished scholar gives the following account¹ of that theory—

In doctrine, at least, we have recently been taught that every right which merits that name carries its actionability, the way in which it is to be proved, the admissibility of exceptions and counter-claims, and finally the execution of the judgment given in its favour, in itself, and that therefore the *lex causæ* alone governs (or should govern) the whole procedure in every material particular except, perhaps, the time for the hearing of the case (though an opportunity to be heard would seem to be inherent in the right which can enforce itself), the length of the tails on a barrister's wig, and the scales of costs—if the *lex causæ* should permit.

This theory is, however, not only out of all accord with practice but would appear to be based on a misapprehension of the vested right theory. First, "such a rule would, of course, impose on court and counsel a burden so enormous that the practical administration of justice would in all cases be seriously hampered and in many instances totally defeated."² Secondly, it is the aim of the vested right theory to establish *equality* between rights acquired under a foreign system of law and those acquired under the municipal law, and not to secure preferential treatment for the one or the other of those types of right. This aim might be defeated if the foreign vested right were enforced in the municipal courts according to the procedure of the foreign court. If, e.g., a person were permitted to enforce in the English jurisdiction a foreign vested right that is statute-barred by English but not by the foreign procedure, he would be in a privileged position to a suitor who relies on a similar right duly acquired under English law. That it would not be compatible with the equality of foreign and municipal vested rights if every vested right were enforced according to its *lex causæ* has been made clear by Lord Tenterden who said³—

A person suing in this country must take the law as he finds it ; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this

¹ A. Mendelssohn-Bartholdi, *loc. cit.*, 16 *B.Y.B.I.L.* (1935), 33.

² 3 Beale, 1599.

³ In *De la Vega v. Vianna* (1830), 1 B. & Ad. 284, 288 ; see further *per* Atkin, L.J., in *The Colorado*, [1923] P. 102, 110.

country may confer. He is to have the same rights which all subjects of this kingdom are entitled to.

2. THE DISTINCTION BETWEEN RIGHT AND REMEDY.

The distinction between the vested right and its enforcement, or, to use a current phrase, the distinction between right and remedy, is well established in the English conflict of laws. In numerous decisions it has been laid down that the right is governed by the *lex causæ*, but the remedy by the *lex fori*.¹ As far back as 1797, Heath, J., observed in a dissenting judgment² that was later accepted³ as containing the true principle—

We all agree, that in construing contracts, we must be governed by the laws of the country in which they are made; for all contracts have a reference to such laws.⁴ But when we come to remedies it is another thing, they must be pursued by the means which the law points out where the party resides.⁵ The laws of the country where the contract was made can only have a reference to the nature of the contract, not to the mode of enforcing it.

The distinction drawn by the English conflict of laws between the right (substance) and the remedy (procedure) makes it imperative to define precisely the incidents pertaining to procedure. This involves a problem of classification which, it will be remembered,⁶ has to be decided on the basis of the *lex fori*. That legal system determines exclusively whether such incidents as the nature of the remedy, the admissibility of evidence, the rules relating to the limitation of actions or to the prescription of rights, or those relating to the remoteness of damage or its measure, have to be grouped under substance or procedure. This result coincides with the rule adopted by the American *Restatement* that

the court at the *forum* determines according to its own conflict of laws rule whether a given question is one of substance or procedure.⁷

Similarly, Professor Beale remarks that ultimately the court is justified in arbitrarily ruling, on the connotation of the terms themselves,⁸ whether an incident belongs to substance or procedure. Once

¹ *Melan v. Duke of Fitzjames* (1797), 1 Bos. & P. 138, 142; *Don v. Lippmann* (1837), 5 Cl. & F. 1, 14; *The British Linen Company v. Drummond* (1830), 10 B. & C. 903; *De La Vega v. Vianna* (1836), 1 B. & Ad. 284; *Huber v. Steiner* (1835), 2 Bing. N.C. 202; *Ex parte Melbourne* (1870), L.R. 6 Ch. 64, 69.

² *Melan v. Duke of Fitzjames* (1797), 1 Bos. & P. 138, 142.

³ See Lord Tenterden, C.J., in *De La Vega v. Vianna* (1830), 1 B. & Ad. 284, 287; see further 3 Beale, 1599, 1621.

⁴ This is the early manner of expressing the proper law doctrine regarding contracts; see p. 99, *ante*.

⁵ That was, in that case, the *lex fori*.

⁶ See p. 34, *ante*; Uthwatt, J., in *In re Cohn*, [1945] Ch. 5, 7 and 8.

⁷ Para. 584, p. 701.

⁸ 3 Beale, 1600; see *per* Atkin, L.J., in *The Colorado*, [1923] P. 102, 110-11.

an incident has been classified, e.g., the limitation of actions under procedure and the prescription of rights under substance, the characterisation of the provision at issue, e.g., the ascertainment whether the legal rule under examination provides for limitation of actionability or a prescription of the right has, in accordance with principle, to be effected on the basis of the *lex causæ*.

In determining which incidents belong to the right and which to the remedy the real difficulty is a problem of classification. Since the division into right and remedy is the same for the conflict of laws as for the internal law, this problem of classification—like most others¹—properly pertains to the internal law of the *lex fori*.

In consequence, in all issues before the English courts, English law—and actually English internal law—determines what pertains to substance and what to procedure. Every student of legal history knows how closely these two topics are interwoven in English law; here the following observations of Dicey² still apply, though a modern tendency to restrict the scope of the term “procedure”³ should be borne in mind—

English lawyers give the widest possible extension to the meaning of the term “procedure.” The expression, as interpreted by our Judges, includes all legal remedies, and everything connected with the enforcement of a right. It covers, therefore, the whole field of practice; it includes the question of set-off and counterclaim, the whole law of evidence, as well as every rule in respect of the limitation of an action or of any other legal proceeding for the enforcement of a right, and hence it further includes the methods, e.g., seizure of goods or arrest of person, by which a judgment may be enforced.

II. MATTERS PERTAINING TO PROCEDURE

The incidents which by English law are regarded as pertaining to the law of procedure have been generally described by Lush, L.J.,⁴ as

the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives, or defines the right, and which by means of the proceeding the Court is to administer; the machinery as distinguished from the product.

Since the legal right as such is in no way affected by the fact that a particular *forum* does not provide “machinery” for the enforcement of the right, a vested right that is unenforceable in the English courts may well be enforceable in the courts of another country. Thus, a French right that is unenforceable in England because it is barred by

¹ See pp. 34–35, *ante*.

² Lorenzen in 32 *Yale Law Journal* (1923), 327.

³ In *Poyser v. Minors* (1881), 7 Q.B.D. 329, 333.

⁴ 5th ed., p. 851.

the English Limitation Act, 1939, may be enforceable in France or Spain if the procedure in the courts of those countries provides more lenient rules relating to the limitation of actions. Indeed, in case of doubt, it is often advisable to argue, *a contrario*, whether, if a particular domestic rule were employed, the plaintiff would, from the point of view of domestic law, still be in a position to enforce his right in another *forum*. An affirmative answer would prompt the conclusion that the domestic rule under examination is of a procedural and not of a substantive character.

We turn now to a detailed investigation of the law of procedure which will be considered under the following heads—

1. The nature of the remedy.
2. Proceedings in court.
3. Evidence.
4. Damages.
5. Limitation of actions.
6. Exchange control restrictions relating to actions in the English courts.

1. THE NATURE OF THE REMEDY.

The statement, that the nature of the remedy sought to be enforced is solely determined by the *lex fori*, hardly requires elaboration. No other law than that of the *forum* is competent to say whether the proper remedy is a claim for damages or for compensation, or for specific performance or for an injunction.¹ Thus, an English court had no hesitation in granting an injunction in a case¹ of the enforcement of a French copyright that enjoyed protection in this country under the International Copyright Act, 1886, though no injunction was apparently admitted by French law, for, as Kekewich, J., observed

it would be an absurdity to say that an English Judge would be bound to give a plaintiff here the remedies, and only the remedies, which a French court would give him; and, on the other hand, that a French court would be bound to give an Englishman suing in France only those remedies which he would get in England, notwithstanding that those remedies were entirely out of place, and arose under different procedures.²

¹ *Baschet v. London Illustrated Standard Co.* (1900), 69 L.J. Ch. 35, 38.

² Professor Cheshire (3rd ed., p. 849) qualifies the rule advanced in the text by maintaining that the remedy provided by the *lex fori* must "harmonise with the right according to its nature and extent as fixed" by the *lex causæ*. Cheshire's authority is the judgment of the majority of Judges in the American Case *Slater v. Mexican National Railway Company* (1904), 194 U.S. 120, decided by the Supreme Court of the United States. It is submitted that this qualification is not supported by English judicial authority, and that the English cases which were very fully reviewed by Fuller, C.J. (at p. 132) in delivering the opinion of the minority, do not admit this qualification.

Similarly, it is left to the exclusive determination of the *lex fori* whether the case has to be presented by means of an action, a petition, an originating summons, a motion or in some other form.

2. PROCEEDINGS IN COURT.

A. Generally. The *lex fori* further governs the actual proceedings in court, including the steps required for the execution of the court's decision. Thus, Lord Brougham observed in *Don v. Lippman*¹—

No one can say that because the contract has been made abroad, the form of action known in the foreign court must be pursued in the courts where the contract is to be enforced, or the other preliminary proceedings of those courts must be adopted, or that the rules of pleading, or the curial practice of the foreign country must necessarily be followed. No one will assert that before the Jury Court in Scotland the English creditor of a domiciled Scotchman would have the right to call for a trial of the case by a jury; or take the converse, that a Scotchman might refuse the intervention of a jury here, and insist on having the case tried, as in Scotland, by the judge only.

Accordingly, the *lex fori* determines such questions as the mode of service of the writ and of legal notices,² the persons who must sue or be sued, or have to be joined as plaintiffs and defendants,³ the priority of creditors in the distribution of assets under the administration of the court,⁴ the admissibility of counterclaims or set-offs,⁵ the rules relating to evidence,⁶ damages,⁷ the limitation of actions,⁸ recovery of costs, and execution against the debtor's person⁹ or property. Of these questions, only two require elucidation in this section, namely the institution of proceedings against a foreign partnership and the priority of creditors.

B. Suits against foreign partnerships. As regards the first problem, the English courts draw a distinction between corporations and partnerships.¹⁰ Foreign corporations can sue and be sued under their corporate name and style, but suits against a foreign partnership cannot be brought against the foreign firm under its firm style. Unless

¹ (1837), 5 Cl. & F. 1, 14.

² *Dobson v. Festi, Rasini & Co.*, [1891] 2 Q.B. 92, 95.

³ E.g., in case of equitable assignments, or in case of suits against a foreign partnership (*infra*).

⁴ At p. 361, *post*. ⁵ *Meyer v. Dresser* (1864), 16 C.B. (N.S.) 646.

⁶ At p. 363, *post*. ⁷ At p. 366, *post*. ⁸ At p. 370, *post*.

⁹ *De la Vega v. Vianna* (1830), 1 B. & Ad. 284 (this case was concerned with the arrest of a debtor pending suit).

¹⁰ *General Steam Navigation Co. v. Guillon* (1843), 11 M. & W. 877; regarding unincorporated companies see *The Bank of Australasia v. Harding* (1850), 9 C.B. 661; see p. 42, *ante*.

the foreign partnership has a place of business in the jurisdiction and can, therefore, be served with process there under Order 48A,¹ all its partners must be joined as defendants² even if the foreign law governing the contract of partnership permits the institution of a suit against the firm as such or service of process on one of the partners or managers with effect against all; for these problems pertain to the law of procedure and are, therefore, withdrawn from the operation of the foreign *lex causæ*. The reason why the English conflict of laws adheres strictly to this rule has been stated by Lindley, L.J., as follows³—

it would be monstrous to allow a plaintiff, after serving only one member of a foreign firm, to obtain by default a judgment which would bind all the partners.

Some foreign laws, as, e.g., those of Scotland and Spain, provide that in the case of a trading partnership it is a condition precedent to the individual liability of the partners that judgment should first be recovered against the firm or all partners jointly and the estate of the firm be exhausted. Such rules of foreign law do not apply to suits brought in the English courts against individual partners because the rules are regarded, by the English conflict of laws, as pertaining to procedure and not to substantive law.⁴

C. Priority of creditors in the distribution of assets under the supervision of the court. As regards the priority of creditors, the *lex fori* regulates the order and rank of creditors claiming in the distribution of assets under the supervision of the court,⁵ i.e. in the cases of bankruptcy, or the administration of the estate of a deceased person, or of the distribution of the proceeds of sale in proceedings *in rem* against a ship, cargo and freight.⁶ The reason why in these cases the order of priority of creditors is determined by the *lex fori*, and not the *lex causæ*, has been indicated in the American case of *Harrison v. Storry*⁷ by Marshall, C.J.—

¹ *Hobbs v. Australian Press Association*, [1933] 1 K.B. 1; see p. 398, *post*.

² *Von Hellfeld v. Rechnitzer & Mayer Frères & Co.*, [1914] 1 Ch. 748.

³ *Dobson v. Festi, Rasini & Co.*, [1891] 2 Q.B. 92, 95.

⁴ *Bullock v. Caird* (1875), L.R. 10 Q.B. 276; *Re Doetsch, Matheson v. Ludwig*, [1896], 2 Ch. 836.

⁵ Other questions of priority are determined by different legal systems. Thus the priority of beneficiaries in a succession *ab intestato* is, as far as movable estate is concerned, determined by the *lex domicilii* of the deceased (see p. 227, *ante*), and the priority of claimants to the title of immovables is, it would seem, determined by the *lex situs* in question (see p. 242, *ante*).

⁶ *Scrutton, L.J.*, in *The Colorado*, [1923] P. 102, 109.

⁷ (1809), 5 Cranch 289, 298–9; approved in *The Colorado*, *supra*, at p. 359; *per Bankes, L.J.*

The right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the cause.

Since the priority of creditors in the case of bankruptcy and administration of estates has been discussed earlier,¹ our present observations will be confined to the case of proceedings *in rem* against a ship, or her cargo and freight, arrested and sold by order of the court.² It was established in *The Milford*³—with reference to Lord Brougham's judgment in *Don v. Lippmann*⁴—that all claims against the proceeds of sale of the ship, whether made by lienholders, necessaries men,⁵ members of the crew or other creditors have to be satisfied in the order and rank prescribed by the *lex fori*. The following "vital"⁶ distinction should, however, be noted in this connection. If the claimant relies on a foreign right, which has an equivalent in English law, as, e.g., the right of a necessaries man, no reference to foreign law is necessary and the court will determine the rank of the claimant according to the order of his English counterpart and disregard the fact that under the foreign *lex causæ* the claimant could claim a prior rank. But if the foreign right on which the claimant relies has no exact equivalent in English law, as e.g., in the case of a French *hypothèque* on the ship, the English courts will first ascertain, on the basis of the foreign law, what the nature and extent of the foreign right is, and after having ascertained the nearest English counterpart to that right, they will distribute the proceeds according to the English order of creditors though it might be entirely different from that of the *lex causæ*. This distinction must be deduced from the following two decisions.

In *The Ziguards*⁷ a claimant who had supplied necessaries to a ship in a German port maintained that he could rely, in the English distribution of the proceeds of the sale of the ship, on the rights which German law conferred upon him, and which were more advantageous than those which a necessaries man has under English law.

The court refused to accept this argument for the reason that necessaries men were a well defined class of creditors in English law, whose position could only be determined, in an English distribution of proceeds, by the English *lex fori*.

¹ For bankruptcy, see pp. 261-2, *ante*, and *Harrison v. Storry* (1809), 5 Cranch 289; *Ex parte Melbourn* (1870), L.R. 6 Ch. 64; for administration, see p. 223, *ante*, and *Pardo v. Bingham* (1868), L.R. 6 Eq. 485.

² The jurisdiction of the English courts in proceedings *in rem* against a ship is explained at p. 399, *post*.

³ (1858), Swab. 362; see also *The Tagus*, [1903] P. 44; *The Colorado*, [1923] P. 102; *The Ziguards*, [1932] P. 113.

⁴ (1837), 5 Cl. & Finn. 1.

⁵ These are persons who have supplied the ship with necessaries, e.g., coal.

⁶ Langton, J., in *The Ziguards*, [1932] P. 113, 124.

⁷ [1932] P. 113.

In *The Colorado*,¹ on the other hand, one claimant relied on a French *hypothèque* on the ship, whilst the other claimants were necessities men.

The court ascertained first what a *hypothèque* was by French law, and having found, as a matter of fact, that the rights conferred by it closely resembled those conferred by an English maritime lien, proceeded to apply the English order of priorities and gave precedence to the claimant under the *hypothèque* over the necessities men, though according to French law the order of distribution would have been reversed.

3. EVIDENCE.

A. Generally. Few legal incidents are so obviously and inherently part of the law of procedure as the mode in which the facts of a particular case are proved to the satisfaction of the court. Lord Brougham said ²—

The law of evidence is the *lex fori* which governs the courts. Whether a witness is competent or not; whether a certain matter requires to be proved by a writing or not; whether certain evidence proves a certain fact or not, that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it.

Thus, the presumption as to the death of a person "is a matter of pure procedure", and the English Court of Probate does not accept as binding a declaration of death of the foreign *lex domicilii* of the person missing.³ On the other hand the presumption as to *commorientes*, laid down in sect. 184 of the Law of Property Act, 1925, is not a rule of evidence but is part of the substantive law because its purpose is not to help in the *ascertainment* of any fact but to determine the *effect* of certain facts, *viz.*, the title to property when it is impossible to say who the survivor was.⁴

B. The form provided by the Statute of Frauds, Sect. 4 and the Sale of Goods Act, 1893, Sect. 4. In every case where the law of a particular country prescribes a certain form for a transaction, it is necessary to analyse carefully the character of that form. If the sanction for non-observance of the form is the *invalidity* of the transaction, the form is a matter of essence; but, if the non-observance of the form merely renders the transaction *unenforceable*, the form is a matter of evidence only.⁵

Our present investigation is concerned solely with the evidential form since the essential form has been discussed earlier.⁵ It should, therefore, be noted that if the law of a particular *forum* requires certain

¹ [1923] P. 102.

² In *Bain v. Whitehaven & Furness Junction Ry. Co.* (1850), 3 H.L. Cas. 1, 15; see also *Yates v. Thompson* (1835), 3 Cl. & F. 544.

³ In *the Goods of Schulhof and Wolf* (1948), 64 T.L.R. 46. (Unless the foreign Court has made a grant of administration, see p. 221, *ante*.)

⁴ In *re Cohn*, [1945] Ch. 5.

⁵ See p. 112, *ante*.

facts to be proved by written evidence, that requirement applies to all suits coming before the courts of that *forum*, even if those suits are based on claims arising under a foreign law that permits the enforcement of the claim on oral evidence. Examples of the evidential form are furnished by Sect. 4 of the Statute of Frauds, 1677, and Sect. 4 of the Sale of Goods Act, 1893. In order to ascertain the true character of the form the wording of the enactments has to be scrutinised.

Sect. 4 of the Statute of Frauds provides that "*no action shall be brought,*

1. to charge any executor or administrator upon any special promise to answer damages out of his own estate; or
 2. to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or
 3. to charge any person upon any agreement made upon consideration of marriage; or
 4. upon any contract for the sale or other disposition of land or any interest in land,¹ or
 5. upon any agreement that is not to be performed within the space of one year from the making thereof,
- unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

Sect. 4 (1) of the Sale of Goods Act, 1893, states that

"a contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

In both instances the words italicised disclose clearly the evidential character of the form. This result has far-reaching consequences. It means that even contracts, the proper law of which is that of a foreign country, must be evidenced in writing in order to be enforceable in the English courts. This rule has actually been laid down in the famous case of *Leroux v. Brown* ²—

An oral agreement was concluded between the parties at Calais whereby the defendant employed the plaintiff at a fixed salary to collect poultry and eggs in that neighbourhood and to transmit them to the defendant in England. The employment was to commence at a future day, and to continue for one year certain, i.e. it was an agreement which was not to be performed within one year from the making of it.

The Court of Common Pleas held unanimously that no action for breach of this contract was admissible in an English court because the contract contravened Sect. 4 of the Statute of Frauds. The evidential

¹ Law of Property Act, 1925, s. (40) (1), replacing the corresponding provision in the Statute of Frauds, s. 4.

² (1852), 12 C.B. 801.

character of that form had, according to the judgment of the court, to be inferred first, from the proper interpretation of the Act, and secondly, from the fact that that form could have been satisfied subsequently by a letter of the defendant addressed to a third party and containing evidence of the terms of the contract.

The rule in *Leroux v. Brown*¹ has been severely criticised, even from the Bench,² but it has also been accepted by writers of authority³ and undoubtedly represents the law. The argument against the rule is, in substance, based upon the ground that the rule results in the frustration of a duly acquired foreign right. Quite apart, however, from the fact that the words of the Act are too plain to admit of another interpretation, it cannot be overlooked that, in exactly the same manner, the rule frustrates duly acquired English rights.⁴ The argument is, therefore, actually directed against the policy of the legislator in prescribing an evidential form—a problem calling for the attention of the Law Revision Committee⁵ but not peculiar to the conflict of laws. The plea for exemption of foreign contracts from the formal requirements of the Acts is, therefore, based on a misinterpretation of the Acts and a misconception of the vested right doctrine.

C. The Evidence Acts. A particular difficulty arises if it is intended to prove in English courts facts which are entered in foreign public registers. In this regard the strict rules of the English law of evidence have been relaxed by certain statutes. The cases in which these facilities are available are as follows—

(i) Entries made in the official registers of the officers in the diplomatic or consular service of the Crown for the registration of births, marriages and deaths⁶ of British subjects born, married or dying out of His Majesty's dominions may be proved by certified copies of those entries, and such copies are evidence of all matters duly registered in those registers [Evidence (Foreign, Dominion and Colonial Documents) Act, 1933].

¹ (1852), 12 C.B. 801.

² Willes, J., in *Williams v. Wheeler* (1860), 8 C.B. (N.S.) 299, 316; the same in *Gibson v. Holland* (1865), L.R. 1 C.P. 1, 8; and Cheshire, 3rd ed., p. 827; W. E. Beckett in 15 *B.Y.B.I.L.* (1934), 69–71; Lorenzen in 32 *Yale Law Journal* (1923), 311.

³ 4 Beale, 1618; Dicey, 5th ed., p. 852.

⁴ Jervis, C.J., in *Leroux v. Brown* (1852), 12 C.B. 801, 824–5.

⁵ The Law Revision Committee in their Sixth Interim Report (Cmd. 5449, 1937) recommended the repeal of s. 4 of the Statute of Frauds, and s. 4 of the Sale of Goods Act, 1893.

⁶ For births and deaths: See the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933, s. 2; similar provisions exist with respect to births and deaths in British merchant ships, H.M. ships of war and certain foreign ships (see *Wills Law of Evidence*, 3rd ed., 1938, p. 250); for marriages: Foreign Marriage Acts, 1892–1947, ss. 16, 17.

Consequently, birth, marriage and death certificates issued by British Consuls, stand, in matters of evidence before the English courts, on the same footing as English municipal birth, marriage and death certificates.

(ii) Further, the Evidence (Foreign, Dominion and Colonial Documents) Act, 1933,¹ adopts a simplified mode of proof of certain foreign documents. Orders in Council, made by authority of the Act, may provide that entries in public registers of foreign countries, dominions or colonies can be proved in the English courts by official copies; that no further evidence regarding the custody or the inability to produce the originals shall be required, and, moreover, that those copies shall be admissible as evidence of the matters regularly recorded therein. Such an Order in Council can only be made if the foreign country in question accords reciprocity to English records, and must specify the foreign registers to which the facilities extend.

At present the powers granted by this enactment have been exercised in respect of Belgium² and France,³ and extend to birth, marriage and death registers and the registration of letters patent, trade marks and other kinds of industrial property in those countries.

(iii) Judgments, decrees, orders and other judicial proceedings of any court of justice in any foreign state or in any British colony, and proclamations, treaties and other acts of state of these countries may be proved in the British courts either by examined copies or by copies sealed with the official seal of the country in question (Evidence Act, 1851).⁴

4. DAMAGES.

The question whether the assessment of damages is a matter of procedure or substance has given rise to some controversy. Three theories have been propounded on this topic. The older English writers like Dicey⁵ and Foote⁶ classify the assessment of damages under the law of procedure and consider it, therefore, as governed by the *lex fori*, a view which is in apparent harmony with that general tendency of the English conflict of laws to attribute the widest possible meaning to the juristic conception of procedure.⁷ The American

¹ S. 1.

² S.R. & O. 1933, No. 383; *North v. North* (1936), 52 T.L.R. 380.

³ S.R. & O., 1937, No. 515.

⁵ 5th ed., 852, 772.

⁶ 5th ed., 521.

⁴ S. 7.
⁷ See p. 358, *ante*.

conflict of laws, on the other hand, is decidedly in favour of the view that the assessment of damages forms part of the substantive law; thus, Professor Beale observes that the right to damages is "as much part of the substantive right of recovery as any of its qualities."¹ A third theory, which has been advanced by Professor Cheshire² as the result of a brilliant analysis of the internal English law, represents, in effect, a compromise between the view of Dicey and that of Professor Beale. According to Professor Cheshire some incidents of the law of damages pertain to substantive law and others to procedural law. The author distinguishes between questions concerning causation (remoteness of damage) and calculation (measure of damage); classifying the former under the substantive law and the latter under the procedural law, Professor Cheshire observes—

In brief, remoteness of liability or remoteness of damage must be distinguished from measure of damage. The rules relating to remoteness indicate what kind of loss actually resulting from the commission of a tort or from a breach of contract is actionable; the rules for the measure of damages show the method by which compensation for an actionable loss is calculated.

Problems pertaining to remoteness of damage include such questions as the true test of causation, i.e., whether it is necessary that the damages suffered be reduced to a "direct cause" or whether they must be foreseeable, or whether a *novus actus interveniens* of a third party interrupts the chain of causation. Problems pertaining to the measure of damage are such questions as whether the plaintiff is entitled to exemplary, substantial, or nominal damages or perhaps no damages at all,³ or how damages expressed in foreign money have to be computed in the currency of the *forum*.

Both tenets of Professor Cheshire's doctrine are, at least indirectly, supported by judicial authority. As regards the rule that the incidents of causation are governed by the substantive law, Professor Cheshire refers to the following considerations. According to the Common Law, interest on a debt—unless payable by express stipulation or by statute or mercantile custom—is recoverable only⁴ in the shape of damages resulting from the wrongful act. It has been held that the recovery

¹ 2 Beale, 1332-3; *Restatement*, para. 372, paras. 413-16.

² 3rd ed., p. 852.

³ *Machado v. Fontes*, [1897] 2 Q.B. 231.

⁴ If at all, see *Second Interim Report of Law Revision Committee*, 1934; as to the discretion of the courts to award interest on debts and damages, see *Law Reform (Miscellaneous Provisions) Act*, 1934, s. 3; see further *London, Chatham & Dover Ry. v. South Eastern Ry. Co.*, [1893] A.C. 429, 437; but see also *Re Anglesey*, [1901] 2 Ch. 548.

of interest on a contractual¹ or tortious² obligation is governed by the *lex causæ* of the debt; i.e., in case of the former by the proper law of the contract, and in case of the latter by the concurrence of the *lex loci delicti commissi* with the *lex fori*. When admitting interest on the basis of the *lex causæ*, the courts in effect determine a question concerning the remoteness of damage on the basis of the *lex causæ*. On the other hand, the case of *Machado v. Fontes*³ clearly demonstrates that the measure of damages is governed by the *lex fori*. It has been seen⁴ that this decision can be reconciled with the other authorities only if interpreted as applying to its logical conclusion the rule that the amount of damages is solely determined by the *lex fori*.

Since all incidents pertaining to the calculation of damages are governed by the *lex fori*, that law determines also the mode and rate of computation, in the currency of the *lex fori*, of damages expressed in foreign money. It is a well established rule of English law⁵ that in an English court damages—and indeed any money claims—must be expressed in English currency, in order to permit of the enforcement of the decision of the court by the ordinary writs of execution. If, therefore, the damages sustained are expressed in foreign money, e.g., if a ship after a collision has been repaired in a foreign port or if a promise to deliver goods at a foreign place has been broken and other goods have had to be substituted at the spot, it becomes necessary to convert the foreign currency into English currency. A similar conversion is necessary if a debt payable in foreign currency is sought to be recovered in the English jurisdiction, e.g., if the debtor has taken up residence in England. In these cases, the date on which the conversion into English currency has to be calculated is of great importance because the rate of exchange of the foreign currency to the pound sterling is liable to fluctuate and may have either appreciated or depreciated in the interval between the wrongful act and the decision of the court assessing the damages.⁶ The problem thus arising may be stated as follows: Has the conversion of the foreign claim into English currency to take place at the rate prevailing at

¹ *Allen v. Kemble* (1848), 6 Moore P.C. 314; *Gibbs v. Fremont* (1853), 9 Ex 25, 31; *Robinson v. Bland* (1760), 2 Burr. 1077; *Cooper v. Earl of Waldegrave* (1840), 2 Beav. 282; *Sir John Champant v. Lord Ranelagh* (1700), Prec. Ch. 128.

² *East India Co. v. Ekines* (1718), 2 Brown P.C. 382.

³ [1897] 2 Q.B. 231, see p. 150, *ante*.

⁴ *Ante*, p. 152.

⁵ *Manners v. Pearson*, [1898] 1 Ch. 581; *Di Fernando v. Simon Smits & Co.*, [1920] 3 K.B. 409; *The Volturno*, [1921] 2 A.C. 544; *Re Chesterman's Trust*, [1923] 2 Ch. 466.

⁶ These questions have been examined by F. Mann, *The Legal Aspect of Money*, Oxford, 1938, pp. 288 *et seq.*

the date on which the wrongful act (e.g. the tort, breach of contract or default in payment of the debt) has been committed (the so-called "breach-date" rule)? Or is the date on which judgment is passed by the English court the correct date for the conversion of the foreign claim into English currency (the so-called "judgment-date" rule)? The English courts¹ are agreed that the conversion has to be effected at the breach-date. The reason has been stated by Lord Wrenbury in *S.S. Celia v. S.S. Volturmo*²—a case dealing with an action in tort—as follows—

The defendant is bound to make such pecuniary payment as would put the plaintiff at the date of the tort in as good a position as he would have been in had there been no tort. If the date taken be that not of the tort but of the judgment, it is giving the plaintiff not damages for the tort, but damages also for the postponement of the payment of those damages until the date of the judgment. If such later damages can be recovered, as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages not for the original tort, but for another and a subsequent wrongful act.

The breach-date rule applies equally to actions for damages (whether brought in tort³ or for the breach of a contract⁴) and to actions for the payment of a debt.⁵

The rule, that money claims expressed in foreign currency are converted at the breach-date rate, is subject to a statutory exception. The Carriage by Air Act, 1932, Sect 1 (5) provides that the limits of liability which in the Act are expressed in French gold francs are to be converted into sterling at the judgment-date rate.

¹ *S.S. Celia v. S.S. Volturmo*, [1921] 2 A.C. 544; *Re British American Continental Bank, Goldzieher's and Penso's Claim*, [1922] 2 Ch. 575, 587; *Crédit Général Liégeois' Claim*, [1922] 2 Ch. 589; *Re Chesterman's Trust*, [1923] 2 Ch. 466; *The Baarn* (No. 1), [1933] P. 251; *Di Fernando v. Simon Smits & Co.*, [1920] 2 K.B. 704; *Re British etc. Bank, Lisser's Claim*, [1923] 1 Ch. 276.

² [1921] 2 A.C. 544, 563-4.

³ *S.S. Celia v. S.S. Volturmo*, [1921] 2 A.C. 544; *The Baarn* (No. 1), [1933] P. 251. See also *Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 K.B. 374, and *Sachs v. Miklos* [1948] 1 All E.R. 67.

⁴ *Di Fernando v. Simon Smits & Co. Ltd.*, [1920] 3 K.B. 409; *Re British American Continental Bank, Goldzieher's and Penso's Claim*, [1923] 1 Ch. 276.

⁵ In the English Courts, a claim for the recovery of a fixed sum of money which originally was expressed in foreign currency is treated as an action in debt, and not as an action for damages; *Re British American Continental Bank Ltd., Crédit Général Liégeois' Claim*, [1922] 2 Ch. 589; *Peyræ v. Wilkinson*, [1924] 2 K.B. 166; *Scrutton, L.J.*, in *Lloyd Royal Belge S.A. v. Louis Dreyfus & Co.* (1927), 27 Ll. L.R. 288, 293; *Madeleine Vionnet et Cie. v. Wills*, [1940] 1 K.B. 12; *Graumann v. Treitel*, [1940] 2 All E.R. 188.

5. LIMITATION OF ACTIONS.

It is, further, well settled that the rules pertaining to the limitation of actions form part of the law of procedure.¹ Here an important distinction is drawn between the limitation of the action and the prescription of the right.² The former operates as a bar to the enforcement of a claim in a particular jurisdiction, the latter extinguishes the right and renders it impossible for the plaintiff to sue in any jurisdiction. Whereas, therefore, the limitation of the action pertains to procedure and is governed by the *lex fori*, the prescription of the right forms part of the substantive law and is governed by the *lex causæ*, i.e., in case of contractual rights by the proper law of the contract,³ and, in case of title to immovables, movables and choses in action, by the *lex situs*.⁴

Two conclusions follow from these rules.

First, in proceedings in the English courts, the English rules of limitation—and exclusively those rules—are applicable. They are mostly contained in the Limitation Act, 1939, which consolidates many of the earlier Statutes of Limitation.⁵ The Act of 1939 provides, in general, a limitation of 6 years for actions on a simple contract and most actions in tort,⁶ a period of 12 years for actions brought upon a specialty,⁷ and a limitation of 12 years for actions brought upon a judgment.⁸ That these provisions of the Limitation Act bar the remedy but do not destroy the right, has been decided by Cotton, L.J., who observed, with reference to an earlier Act, that “statute-barred debts are due, though payment of them cannot be enforced by action.”⁹ It has consequently been held that the English rules of limitation likewise bar an action based on a foreign contract though the proper law of the contract may admit a longer period of limitation.¹⁰

Further, if in an English suit the defendant alleges that the plaintiff is debarred from pursuing his claim by some foreign rule of prescription or limitation, a careful analysis of that rule on the basis of

¹ *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *Huber v. Steiner* (1835), 2 Bing. N.C. 202; *Don v. Lippmann* (1837), 5 Cl. & F. 1; *Harris v. Quine* (1869), L.R. 4 Q.B. 653.

² As explained at p. 171, *ante*.

³ *Huber v. Steiner* (1835), 2 Bing. N.C. 202.

⁴ *Bechford v. Wade* (1805), 17 Ves. Jun. 87; see p. 172, *ante*.

⁵ See Schedule to the Act of 1939 setting out the earlier (and now repealed) Limitation Acts. It should, however, be noted that in some instances the Limitation Act, 1939, provides for the extinction of title; see Sect. 3 (2) as regards chattels, and Sect. 16 as regards land (p. 172 (n) 2, *ante*).

⁶ S. 2 (1).

⁷ S. 2 (3).

⁸ S. 2 (4).

⁹ In *Curwen v. Milburn* (1889), 42 Ch. D. 424, 434.

¹⁰ *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *Don v. Lippmann* (1837), 5 Cl. & F. 1.

the foreign *lex causæ* must be made. If the foreign rule is to be characterised as a rule of prescription, e.g., as it was said in one case ¹—

by the law of France, the contract made by the defendant . . . is altogether extinguished and made null and void in that country,

it would provide a valid defence in the English courts. But if the foreign rule in question bars only the enforcement of the right in the foreign courts it is, in fact, a rule of limitation, applicable only to the procedure in the foreign courts, but not available in English proceedings.² Moreover, a plaintiff after having first instituted an action in a foreign court and having lost it on the ground that it was statute-barred by the foreign *lex fori*, can still bring a subsequent action in the English courts which will then disregard the foreign judgment entirely as being merely based on a rule of foreign procedure, and will give judgment in his favour if the claim is otherwise unobjectionable. This was decided in *Harris v. Quine*.³

In that case, the plaintiffs, attorneys in the Isle of Man, sued the defendant for legal fees. They had first brought their action in the Manx Court but judgment has been given against them because their claim was barred by the Manx statute of limitations.

The plaintiffs then commenced proceedings against the defendant in England. The defendant relied, *inter alia*, on the judgment of the Manx Courts in his favour, but this defence was overruled by the English Court. Blackburn, J., said: "The Manx statute of limitations applies to the conduct of the suit, and therefore comes within the category of *lex fori*, and not *lex contractus* . . . in the present case, all that the Manx court decided was, that in the courts of the Isle of Man the plaintiffs could not recover. If the plaintiffs could have shewn, as was attempted in *Huber v. Steiner*,⁴ that the law of the Isle of Man extinguished the right as well as the remedy, and this had been the issue determined by the Manx court, that would have been a different matter."

6. EXCHANGE CONTROL RESTRICTIONS RELATING TO ACTIONS IN THE ENGLISH COURTS.

The Exchange Control Act, 1947, and the statutory orders made thereunder, impose a strict control on dealings in gold, foreign currency and securities, and regulate payments to be made within and outside the United Kingdom. Since in an English court money claims must be expressed in English currency,⁵ the only provisions of the Act affecting proceedings in court are those of sect. 5, which, generally speaking, prohibit the payment by any person to or for the credit of

¹ *Huber v. Steiner* (1835), 2 Bing. N.C. 202, 210.

² *Huber v. Steiner* (1835), 2 Bing. N.C. 202; *Harris v. Quine* (1869), L.R. 4 Q.B. 653.

³ (1869), L.R. 4 Q.B. 653.

⁴ (1835), 2 Bing. N.C. 202.

⁵ See p. 368, *ante*.

a person resident outside "the scheduled territories."¹ To ensure the observation of these provisions, the Rules of the Supreme Court (Exchange Control), 1947,² impose certain duties upon the parties to proceedings brought in the English courts.

The plaintiff has to give a full disclosure of his residence. Normally his address has to be stated in the writ of summons;³ where, however, a plaintiff acts in a representative capacity, the addresses of the persons represented by him do not appear on the writ. Such representative actions are admitted where numerous persons have the same interest in one matter,⁴ e.g. one shareholder might sue on behalf of all shareholders of the same class of shares. In these cases, the indorsement of the writ has to show the representative capacity of the party suing or sued, and it is further provided, by an Order⁵ amending the Rules of the Supreme Court, 1883, that, if the action is

brought by or on behalf of a person resident outside the scheduled territories, as defined by the Exchange Control Act, 1947, the indorsement shall so state and shall state the residence of such person.

Further, the defendant, or any person who

is directed by any judgment, order, or award, to pay any money to or for the credit of any person resident outside the scheduled territories, as defined by the Exchange Control Act, 1947, . . . shall, unless the permission of the Treasury under the said Act has been given unconditionally, or upon conditions which have been complied with, pay such money into court.⁶

Payment into court operates as a good discharge of the person making the payment, and the person, in whose favour payment has been made, may take the money out of court upon satisfying the court that the necessary Treasury permission has been granted.⁷

¹ The following are "the scheduled territories": (1) the United Kingdom; (2) any Dominion within the meaning of the Statute of Westminster, 1931, except Canada and Newfoundland; (3) any part of H.M. dominions, not being a Dominion within the meaning of the Statute of Westminster, 1931, or a part of such a Dominion; (4) any territory except Palestine in respect of which a mandate on behalf of the League of Nations has been accepted by H.M. and is being exercised by H.M. Government in the United Kingdom or the Government of any Dominion; (5) any British protectorate or British protected state; (6) Burma; (7) . . . ; (8) Iraq; (9) . . . ; (10) Iceland; (11) The Faroe Islands (Exchange Control Act, 1947, Sched. I, as amended by S.R. & O. 1947, No. 2042, S.R. & O. 1947, No. 2691, S.I. 1948, No. 284; the provisions of the Act extend to the Channel Islands).

² S.R. & O. 1947, No. 1920. Similar provisions exist for County Court proceedings: County Court (Exchange Control) Rules, 1947 (S.R. & O. 1947, No. 1919). ³ R.S.C., Order 4, rules 1 and 2 (1). ⁴ Order 16, rules 9 and 9A.

⁵ Order 3, rule 4 (2).

⁶ Order 42, rule 1(2)-(4).

⁷ Order 22, rule 22: The Rules of the Supreme Court (Exchange Control), 1947, have amended the Rules of the Supreme Court in a few other consequential matters.

III. PROOF OF FOREIGN LAW IN THE ENGLISH COURTS

In the English conflict of laws every body of law other than English law is regarded as foreign law. It does not make any difference whether the legal unit, the law of which is in question, forms part of Great Britain, the British Empire or a foreign state. Strange as it may sound, in the English courts Scots law is as much foreign law as Chinese law.

1. WHERE BRITISH COURTS TAKE JUDICIAL COGNISANCE OF FOREIGN LAW.

Sometimes British courts sitting in London exercise appellate jurisdiction over non-English legal units, but no problem peculiar to the conflict of laws is involved in these cases because if, e.g., the House of Lords in a Scottish appeal case applies Scots law, it acts as a Scottish tribunal,¹ and applies the municipal law of Scotland. Similarly, the Privy Council in an Indian appeal case may apply Indian law, thus acting as an Indian tribunal.

Occasionally, however, a different problem arises. In an English appeal before the House of Lords, a question of Scottish law may be raised. Though in the lower English courts this question would be regarded as a question of fact, which, as a rule, has to be proved by expert witnesses, the position is different in the House of Lords. Since that court is *commune forum* of England and Scotland, it has *ex officio* knowledge of Scottish law, so that there a dispute on that law would be considered as a question of law. Lord Macmillan² observed in such a case—

No doubt in the courts below the law of Scotland is a matter of fact and must be vouched there by evidence or admission. But in your Lordships' House the law of Scotland is a matter not of fact but of law, for this House is the *commune forum* of both England and Scotland and your Lordships have judicial knowledge of the laws of both countries.

By way of analogy it would appear³ that the Privy Council takes judicial notice of the laws of all countries for which it is *forum commune*. The cases where courts take judicial cognisance of a foreign legal system are naturally exceptional.

¹ *Concha v. Murieta* (1889), 40 Ch. D. 543; 550.

² *Elliot v. Lord Joicey*, [1925] A.C. 209, 236.

³ This view is supported by the provisions of the British Law Ascertainment Act, 1859, s. 4.

2. WHERE FOREIGN LAW IS A QUESTION OF FACT.

Ordinarily the English courts consider questions of foreign law as allegations of facts which, like other facts, have to be proved by the party relying on them.¹ Thus, Scrutton, L.J., observed ²

Foreign law is a question of fact to an English court; the judgment of a foreign judge is not binding on an English court, but is the opinion of an expert on the fact, to be treated with respect, but not necessarily conclusive.

Notwithstanding that principle, the duty of determining whether, in fact, the foreign law in question has been proved to the satisfaction of the Court has been vested by the Judicature Act, 1925,³ in the judge instead of the jury. This enactment provides—

Where it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone.

Since the enactment has not altered the principle as such, foreign law must still be specifically alleged in the pleadings which, as will be remembered, normally state only the facts and not the law.

A. Presumption that the foreign law is the same as English law.

As regards the mode in which foreign law is proved in the English courts, the following rebuttable presumption should be noted. "Unless there is proof to the contrary, foreign law will be presumed to be the same as English."⁴ This presumption throws the burden of proof on the person maintaining that the foreign law on which he relies differs from English law, and if he fails to discharge this burden the English court is bound to assume that the foreign law is the same as English law⁵ though the English court might have ascertained in an earlier reported decision that, in fact, it is different.⁶

The operation of this presumption is illustrated by *Male v. Roberts*⁷

¹ *Dynamit A.G. v. Rio Tinto*, [1918] A.C. 260, 301; *Beatty v. Beatty*, [1924] 1 K.B. 807, 814.

² In *Guaranty Trust Company of New York v. Hannay & Co.*, [1918] 2 K.B. 623, 667.

³ S. 102; it has been held in *R. v. Hammer*, [1923] 2 K.B. 786, that a similar provision contained in the Administration of Justice Act, 1920, s. 15 applied also to a criminal prosecution.

⁴ Atkin, L.J., in *The Colorado*, [1923] P. 103, 112; Lord Greene, M.R., in *De Reneville v. De Reneville* (1948), 64 T.L.R. 82, 84.

⁵ *Nouvelle Banque de l'Union v. Ayton* (1891), 7 T.L.R. 377; *In re Manners*, [1923] 1 Ch. 220.

⁶ *Beatty v. Beatty*, [1924] 1 K.B. 807, 814-15.

⁷ (1800), 3 Esp. 163; see p. 112, *ante*.

where a defence based on Scottish law failed because, in the words of Lord Eldon—

what that law is, should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is, without evidence.

B. Rebuttal of the presumption. In view of the presumption under consideration, the proof of foreign law is a problem of great practical importance. Unless the foreign law is admitted or the parties agree on a statement of the relevant foreign enactments and rules the foreign law must be established by expert witnesses.

The qualification for an expert witness on foreign law is that he must have had some practical experience in that law. Though practice in the forensic application of the foreign law is certainly preferable, it is not necessary that the expert should have acted or is acting as a judge or practitioner in the courts of that country. Thus, in an issue concerning a technical point in banking law, the evidence of a banker, who had had 47 years' practical experience in banking and whose firm had had extensive business interests in the country in question, was preferred to that of a young barrister practising in the courts of that country for four years.¹ Further, the following have been considered competent witnesses—a Roman Catholic Bishop on the matrimonial law of his Church,² a former Governor of a colony on the validity of a marriage celebrated in that colony,³ diplomatic officers versed in the law of their country on questions concerning the administration of estates situate there,⁴ an English barrister having studied and advised on the law of a foreign country, on the marriage laws of that country,⁵ a Reader in Roman-Dutch Law for the Incorporated Council of Legal Education who instructed students of the Bar intending to practise in the colonies on a question of Southern Rhodesian company law.⁶ It is evident from these examples that much depends on the subject matter at issue, e.g., a banker who might be competent to prove the banking law of a foreign country would not be qualified to give evidence of its matrimonial law. A purely academic acquaintance of the laws of a foreign country is not regarded

¹ *De Belche v. South American Stores Ltd. and Chilean Stores Ltd.*, [1935] A.C. 148, 157.

² *The Sussex Peerage Case* (1844), 11 Cl. & F. 85.

³ *Cooper-King v. Cooper-King*, [1900] P. 65, 66.

⁴ *In the Goods of Dost Aly Khan* (1880), 6 P.D. 6.

⁵ *Barford v. Barford*, [1918] P. 140; *Wilson v. Wilson*, [1903] P. 157; see also *In the Goods of Whitelegg*, [1899] P. 267 (an English notary public on the administration of an estate in Chile).

⁶ *Brailey v. Rhodesia Consolidated Ltd.*, [1910] 2 Ch. 95, 102.

as sufficient qualification for an expert witness even if he has studied at a university in that country.¹

If the evidence of the expert witnesses is conflicting, the court, upon consideration of its relative weight, will either accept the opinion of some of them whilst rejecting that of others, or else, without accepting the propositions of either of them, will put its own construction on the authorities referred to by the experts in the course of their evidence.²

It would appear that the court is further at liberty to interpret the foreign law as laid down in enactments, statements, reports or textbooks without expert witnesses having been called, if these documents are agreed between the parties or admitted.³ In this case the English rules of interpretation will be applied unless it is proved or admitted that the foreign rules of interpretation are different from those of English law.⁴

Certain legal facts which have occurred abroad, like births, marriages, deaths or the registration of patents, trade marks or other kinds of industrial property may, in special circumstances, be proved by the production of copies of the foreign registers.⁵

C. Judicial ascertainment of foreign law. English law provides a further method for the ascertainment of foreign law. An English court desirous of obtaining an opinion in law upon a particular case is authorised by statute to remit the case to the foreign court administering that law, the remission being subject to certain conditions. This power is derived, so far as British dominions are concerned, from the British Law Ascertainment Act, 1859; so far as British Protectorates, Mandated Territories or foreign countries in which the King exercises jurisdiction are concerned, from the Foreign Jurisdiction Act, 1890;⁶ and so far as other foreign countries are concerned, from the Foreign Law Ascertainment Act, 1861. The Act of 1859 empowers the English courts to remit the case to a superior Court in the British dominions whenever they consider this course expedient, but, if a remitter is contemplated to the courts of a country to which the Acts of 1861 or 1890 apply, it must first be ascertained whether the

¹ *Bristow v. Sequeville* (1850), 19 L.J. Ex. 289; *In the Goods of Bonelli* (1875), 1 P.D. 69.

² *In re Duke of Wellington*; *Glentanar v. Wellington*, [1947] 1 Ch. 506; *De Beêche v. South American Stores Ltd. and Chilean Stores Ltd.*, [1935] A.C. 148, 158; *Concha v. Murietta* (1889), 40 Ch. D. 543; *Bremer v. Freeman*, [1857] 10 Moo. P.C. 306; *Buerger v. New York Life Assurance Co.* (1927), 43 T.L.R. 601, 603.

³ *Ibid.*

⁴ *Buerger v. New York Life Assurance Co.* (1927), 43 T.L.R. 601, 603.

⁵ See p. 365, *ante*.

⁶ S. 5, Sched. 1.

relevant Act has been extended by Order in Council to the particular foreign country in question. This has so far been done with respect to a number of British Protectorates and Mandated Territories in the Middle East and Africa and to some foreign countries (in which the King exercises jurisdiction) situate in the Orient.

The English courts have only rarely¹ availed themselves of the power granted by these Acts. The ascertainment of foreign law by means of remission is not only slow and cumbrous but also a crude and unsatisfactory method of solving problems pertaining to the conflict of laws. For even if the foreign tribunal is, according to its rules of procedure, entitled to answer abstract questions of law, the danger of misunderstanding is great because it would hardly be feasible to acquaint the foreign court fully with all those details of fact in issue which if brought to its knowledge might influence its opinion. Moreover, the efficacy of this procedure is further impaired by the fact that, by virtue of express provisions in the Acts,² the opinion of the foreign court is not binding on the English court.

¹ See *Duncan v. Lawson* (1889), 41 Ch. D. 394. (Remitter from the Scottish Court); *Login v. Princess Victoria Gouramma of Coorg* (1862), 30 Beav. 632 (remitter to the Bengalese court).

² British Law Ascertainment Act, 1859, s. 3 and 4; Foreign Law Ascertainment Act, 1861, s. 2.

CHAPTER XV

JURISDICTION OF THE ENGLISH COURTS

I. GENERAL PRINCIPLES OF JURISDICTION

In the remaining two chapters, the jurisdiction of the English and foreign Courts in matters pertaining to the conflict of laws will be considered. As in the preceding chapters, the general principles on which the rules of law rest will be examined before the details of the rules are explained.

1. THE TERRITORIAL LIMITS OF JURISDICTION.

It should at the outset be noted that there exists a close connection between the juristic conceptions of jurisdiction, sovereignty and territoriality. The sovereign, i.e., in England the King in Parliament, exercises supreme power in his territory by means of jurisdiction, be it of the legislative, judicial or executive type.¹ The exercise of jurisdiction by the sovereign within his territory is recognised by other sovereign states, in the same way as those states expect that their jurisdiction over their territories should be respected by the first mentioned sovereign.

The territorial limitation of jurisdiction has been clearly expressed by Story² as follows—

No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity and incapable of binding such persons or property in any other tribunals.

That the judicial jurisdiction—the only aspect of the general jurisdiction of the sovereign which interests us in this connection—is confined to the sovereign's territory³ is not an isolated phenomenon. The same principle applies to legislative and executive⁴ jurisdiction. The territorial limitations of legislative jurisdiction have been illustrated in an earlier chapter by reference to the effect of national enactments purporting to confiscate property, such as, e.g., the Soviet

¹ See 1 Beale, 305, 308, 322; and *American Restatement*, Paras. 56, 59, 71

² Story, 8th ed., 1883, s. 539.

³ See *The Fagerness*, [1927] P. 311.

⁴ F. A. Mann, "The Sacrosanctity of the foreign Act of State", 59 *L.Q.R.* (1943), 42.

confiscatory legislation which, as will be remembered, extended only to property situate at the time of confiscation within the territorial dominion of the Soviet Union. In that connection attention was drawn to the canon of construction that every enactment has to be construed as having municipal effect only.¹ Of course, a sovereign may deliberately choose to transgress beyond the territorial limits of his jurisdiction, as has been done by the English Parliament when enacting that the title of an English trustee in bankruptcy shall extend to all movables and land of the debtor wherever situate,² or, more particularly in the department of judicial jurisdiction, by the English enactments, providing that the Admiralty Court shall have jurisdiction over any claim for damage done by any ship,³ or admitting service of legal process out of the jurisdiction.⁴ These deliberate transgressions, however, though locally valid and binding on the municipal courts, might be internationally⁵ (i.e. in the courts of another sovereign) devoid of any effect.

That the judicial jurisdiction, or, as it is usually called, the jurisdiction of the courts, is subject to the territorial limitations of sovereignty, has been clearly stated by the Privy Council in the leading case of *Sirdar Gurdial Singh v. The Rajah of Faridkote*.⁶

The Rajah and ruler of Faridkote, which for the purposes of the conflict of laws was an independent foreign state, had employed the father of the appellant as his treasurer. Considerable defalcations in the treasury moneys were alleged. The treasurer thereupon left the employment of the Rajah and returned to his native country, another Indian state which from the conflictual point of view was also an independent foreign political unit.

The Rajah obtained judgment for certain sums of money in the courts of Faridkote against the absent ex-treasurer who did not submit to the jurisdiction of those courts. On appeal to the Privy Council the question was raised whether the courts of Faridkote had properly assumed jurisdiction over a non-submitting absentee.

The Board was of the opinion that the judgment of the courts of Faridkote was "a nullity by international law." The Board stated the principle of law involved in the case as follows⁷: "All jurisdiction is

¹ See 56, *ante*, and *per curiam* in *Mount Albert Borough Council v. Australasian Temperance and Mutual Life Assurance Society Ltd.*, [1937] 4 All E.R. 206, 216; Scott, L.J., in *Yorke v. British & Continental Steamship Co., Ltd.* (1945), 78 Ll.L.R. 181, 183.

² Bankruptcy Act, 1914, s. 167; see p. 258, *ante*.

³ Judicature Act, 1925, Sect. 22 (1) (a) (iv); *The Tolten*, [1946] P. 135.

⁴ Assumed jurisdiction; see p. 390, *post*.

⁵ The distinction between the international and local jurisdiction of the courts is further explained at p. 421, *post*.

⁶ [1894] A.C. 670; see also *Tallack v. Tallack*, [1927] P. 211, and *Warner Brothers Pictures, Inc. v. Nelson*, [1937] 1 K.B. 209, 222.

⁷ At p. 683.

properly territorial and '*extra territorium jus dicenti impune non paretur*.' Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory."

2. THE COMPETENCE OF THE COURTS. ACTIONS IN PERSONAM AND IN REM.

. The statement that the international jurisdiction of the courts is limited in space represents only the negative aspect of the problem under examination. Our next task is to ascertain positively the rules governing the competence of the courts to adjudicate on issues involving a conflict of laws.

These rules differ according to the nature of the proceedings in question, and the distinction between actions *in personam* and actions *in rem* is relevant.¹ An action *in personam* is an action directed against a person and praying the court to order that the person should do or not do a particular act, e.g., should pay a sum of money, perform a contract specifically, or refrain from committing a nuisance.² The effect of a decision *in personam* is, in the words of Blackburn, J.,³ that it "though in general binding between the parties and privies does not affect the rights of third parties." An action *in rem* is an action against a particular thing (*res*) aiming at a disposition of that thing by order of the court, or else an action against a person concerning title to or possession of immovable or movable property. A decision *in rem* produces absolute and general effect. In proceedings *in rem* the court has, as Blackburn, J., observes⁴ (with respect to the first type of actions *in rem*) "jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing and not merely the interest of any particular party in it be sold and transferred." The difference between judgments *in personam* and *in rem*⁵ can best be seen when property is sold in execution of a judgment. If the

¹ See on this distinction Halsbury's *Laws of England*, 2nd ed., Vol. I, pp. 64-5; Dicey, 5th ed., Rule 59, p. 228, and Rule 61, p. 269; *Castrique v. Imrie* (1870), L.R. 4 H.L. 414.

² Dicey, 5th ed., Rule 59, p. 228; the modern conception of the action *in personam* is not identical with the historical *actio personalis* (Halsbury, *op. cit.*, p. 65, n. e.)

³ In *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 427.

⁴ *Ibid.*

⁵ See Piggott, *Foreign Judgments*, 3rd ed., 1908, Vol. II, p. 5.

property is sold in pursuance of a judgment *in personam*, the purchaser will acquire a derivative title, depending, for its validity, on the title of the judgment debtor, for the judgment (which ordered the debtor to pay a certain sum of money) cannot produce effect otherwise than in regard to the parties. If, on the other hand, property is sold by virtue of a judgment *in rem*, the purchaser will acquire an absolute title, independent of that of the previous owner and valid against the whole world, because the sale (which is effected by order of the court) directly changes the disposition of the thing. A further class of actions "savours" of *res*; these actions are not concerned with immovable or movable property but with the status of a person, e.g., the matrimonial status. Decisions savouring of *res* produce, like judgments *in rem* in the stricter sense, an absolute effect against third persons and are, in general, governed by the same rules as those applicable to actions *in rem* in the stricter sense.

The principles determining the international jurisdiction of the English and foreign courts are different in the case of actions *in personam* and actions *in rem*. Little difficulty exists with respect to the latter class of actions. As regards actions *in rem* directed against a specific thing (*res*), i.e., in the case of actions *in rem* in the stricter sense, the courts are, in principle, competent to assume jurisdiction if the property in question is situate within the territory over which their jurisdiction extends. The competence of the courts in actions *in rem* concerning the status of a person is generally determined by the law of the domicile of that person, as illustrated by the jurisdiction over matrimonial causes. It will be noted that whatever the subject matter of the action *in rem*, the English courts do not, on principle, claim a wider jurisdiction than they are willing to concede to the foreign courts.

3. THE COMPETENCE OF THE COURTS IN ACTIONS *IN PERSONAM*.

Our investigation will now be directed to one of the most interesting problems in the conflict of laws, i.e., the ascertainment of the general principles of jurisdiction governing the competence of the English and foreign courts in actions *in personam*.

A. Based on the principles of presence and submission. The English authorities would appear to permit a clear statement of these principles. The international jurisdiction of the courts in actions *in personam* is based either

- (a) on the *presence* of the defendant within the jurisdiction of the court at the beginning of the suit; or
- (b) on the *submission* of the defendant to the jurisdiction of the court.

In the practice of the English and foreign courts, these two principles are supplemented by other rules of a local or auxiliary character which owe their existence mainly to convenience but which should not distract our attention from the fundamental character of the two principles of presence and submission.

(a) THE PRINCIPLE OF PRESENCE. The principle of presence is based upon allegiance owed to the sovereign not only by his subjects but—temporarily—also by aliens living in his territory.¹ Lord Russell observed in *Carrick v. Hancock*² that

the jurisdiction of a court was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its courts. In his opinion that duty of allegiance was correlative to the protection given by a state to any person within its territory.

It is noteworthy that the principle of presence is not based on allegiance as such but on allegiance asserted within the limits of territorial jurisdiction. This represents a compromise between the two often conflicting notions of territoriality and allegiance (nationality). Allegiance is personal, not territorial. The British subject in France and the British subject in England alike owe allegiance to the King. In the conflict between territoriality and allegiance, however, territoriality is regarded, by the English conflict of laws, as the superior principle. That explains why internationally, i.e., as far as the recognition of the jurisdiction of one sovereign by other sovereign powers is concerned, allegiance is recognised as the basis of jurisdiction in a territorially qualified form only.

(b) THE PRINCIPLE OF SUBMISSION. In certain cases the parties to a suit are at liberty to submit their dispute to a court which otherwise is not competent, and the court will then found its jurisdiction on the express or implied submission of the parties. Such submission is, it appears, permitted in all cases where the subject matter of the suit can be regulated by the parties at will, e.g., in actions concerning

¹ *Schibsbay v. Westenholz* (1870), L.R. 6 Q.B. 161; *Turnbull v. Walker* (1893), 67 L.T. 767, 769; *Carrick v. Hancock* (1895), 12 T.L.R. 59; *Stephen's Commentaries*, 19th ed., Vol. 1, 151; *Westlake*, 7th ed., p. 243; *Cheshire*, 3rd ed., p. 779.

² (1895), 12 T.L.R. 59.

contracts, but it is generally not admissible in the case of proceedings *in rem*, e.g., in actions concerning title of and possession to land,¹ or concerning status such as marriage.²

B. A principle of effectiveness not recognised by the English courts. Dicey³ and Professor Cheshire⁴ maintain that, apart from the principle of submission, the jurisdiction *in personam* of the English courts rests upon a general principle of effectiveness, and not on that of presence which, in the view of these authors, governs, however, the corresponding jurisdiction of the foreign courts. Dicey defines the so-called principle of effectiveness as follows—

The courts of any country have jurisdiction over (i.e., have a right to adjudicate upon) any matter with regard to which they can give an effective judgment, and have no jurisdiction over (i.e., have no right to adjudicate upon) any matter with regard to which they cannot give an effective judgment.

This theory is supported by a remark of Lord Merrivale, P., in *Tallack v. Tallack*⁵ where an English Court was asked to exercise its statutory authority in order to settle a divorced wife's property upon the children of the marriage although the property was situate in Holland. The learned President refused the petition on the ground that to accede to it would result in an excess of the English jurisdiction beyond its territorial limits—a ground that was sufficient in itself to support the decision of the Court. But he then went on to cite from Dicey the remark quoted above and continued—

It is not clear that the judicial tribunals of the Netherlands are able to give effect at all to judgments of foreign courts even in personal actions against defendants living in Holland. But having regard to the terms of the Civil Code, and the evidence of Dr. Bisschop, I am satisfied that a decree of this court purporting to partition the property of the respondent would be an idle and wholly ineffectual process.

Since this *dictum* cannot be considered as settling the matter conclusively, it is still necessary to enquire whether in fact a principle of effectiveness exists in the English conflict of laws as the basis of the general jurisdiction of the courts. The reasons which militate against such an assumption are strong and, it is believed, conclusive. First, the supporters of the principle themselves admit that the jurisdiction of the courts of domicile in matters of personal status "is not entirely consistent with the principle of effectiveness"⁶ because if

¹ See p. 165, *ante*.

² 5th ed., p. 30.

³ [1927] P. 211, 221.

EE—(L.67)

² See p. 315, *ante*.

⁴ 3rd ed., at pp. 139–142.

⁶ Dicey, 5th ed., p. 31.

the parties reside in a legal unit different from that of their domicile, they as well as their law of residence may, in fact, pay no attention to a pronouncement of the courts of their domicile. Whilst this objection could be met by the rejoinder that decisions *in rem* form a distinct class for themselves and are subject to special considerations, it is significant that even in the sphere of proceedings *in personam* judgments are frequently pronounced the practical effect of which is doubtful. By virtue of the assumed jurisdiction¹ the English courts are competent, in certain instances, to entertain actions without regard to the possibility of enforcing their decision, and even the knowledge that the foreign court which has power to attach the person or property of the defendant may ignore the decision of the English courts would hardly deter those courts from exercising jurisdiction in appropriate cases. Moreover, Order 25, rule 4, admits declaratory judgments which can be granted though the plaintiff has no present cause of action against the defendant² or cannot claim consequential relief from him. This rule provides³—

No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

Further, a judgment may change its effectiveness in course of time. An apparently ineffective judgment may acquire practical importance at a later stage, e.g., if after the pronouncement of the decision the defendant takes up residence in the jurisdiction or his personal property devolves, by way of general assignment, to a person amenable to the authority of the court which pronounced the decision. Moreover, an English judgment, which at the date of its pronouncement may not even be recognised in a foreign court as evidence of the original cause of action, may, at some future time, become directly enforceable in that foreign country, by reason of an enactment of the foreign legislature giving effect to an International Convention similar to that concluded in 1936 with Belgium⁴ and France.⁵ Finally, it would be strange if the fundamental principle upon which the jurisdiction of the English and foreign courts is supposed to rest should be affected by the accidental choice of foreign country in which the judgment is

¹ See p. 390, *post*.

² *Guaranty Trust Company of New York v. Hannay*, [1915] 2 K.B. 536.

³ Rules of the Supreme Court, 1883, Order 25, Rule 4.

⁴ See S.R. & O., 1936, No. 1169; see p. 442, *post*.

⁵ See S.R. & O., 1936, No. 609; see p. 442, *post*.

sought to be enforced.¹ In the result, it is believed, that the jurisdiction of the courts is not based upon considerations of the actual or probable effect of their decision. The argument from the effect of the judgment to the jurisdiction of the court represents an approach to the problem under investigation from the wrong end, in the same way as the argument from the effect of the choice of law to the choice itself is, in the words of Lord Russell, founded upon a "fallacious basis."²

C. Comparison of the competence of the English and foreign courts in actions *in personam*. In conclusion, we will compare the rules determining the competence of English and foreign courts to entertain actions *in personam*.

Competence of the English Courts.

- | | |
|--|--|
| <p>(1) Where the defendant was present in the jurisdiction when the action began.</p> <p>(2) Where the defendant voluntarily submitted to the jurisdiction of the Court.</p> <p>(3) Where the Court is empowered to order the service of the writ (or of notice thereof) out of the jurisdiction (so-called assumed jurisdiction).</p> | <p><i>Competence of the Foreign Courts.</i></p> <p>(1) "Where the defendant is a subject of the foreign country in which the judgment has been obtained.</p> <p>(2) Where he was resident in the foreign country when the action began.</p> <p>(3) Where the defendant in the character of plaintiff has selected the <i>forum</i> in which he is afterwards sued.</p> <p>(4) Where he has voluntarily appeared.</p> <p>(5) Where he has contracted to submit himself to the <i>forum</i> in which the judgment was obtained."³</p> |
|--|--|

From this synopsis the following facts emerge. The jurisdiction of the English courts is determined by the two principles of Presence and Submission (left column, (1) and (2)) which are supplemented by the assumed jurisdiction (left column, (3)). The jurisdiction of the foreign courts is equally governed by the principles of Presence (right column, (2)) and Submission (right column, (3) to (5)) which are supplemented by the rule that the English courts will recognise a foreign judgment *in personam* if the defendant was, at the time of the pronouncement of the judgment, a national of the foreign country

¹ Lord Merrivale attached in *Tallack v. Tallack*, [1927] P. 211, 221, great weight to the fact that according to the expert evidence the Dutch courts paid no attention to the decision of the English courts. Would his decision have been different if the property had been situated, say, in France?

² In *R. v. International Trustee*, [1937] A.C. 500, 557; see p. 111, *ante*.

³ This catalogue is taken from the judgment of Buckley, L.J., in *Emanuel v. Symon*, [1908] 1 K.B. 302, 309.

(right column, (1)). In the result, the jurisdiction of the English and foreign courts is governed alike by the twin maxims of Presence and Submission and is co-extensive, but there exist two exceptional instances of jurisdiction, one on the English side in favour of the assumed jurisdiction and one on the foreign side in favour of the jurisdiction over nationals. These exceptional cases require closer attention.

Regarding first the assumed jurisdiction of the English courts, it can hardly be doubted that this type of jurisdiction, which in the case of English law is based on statutory authority, is of purely local character and cannot claim recognition internationally, i.e., in the courts of another sovereign. The words of Lord Ellenborough ¹—

Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?

apply not only to the assumed jurisdiction of Tobago, but to that of any other country. Nobody has seen that clearer than Story,² who wrote at a time when the rules of Order II were not yet incorporated into English law ³—

In respect to such suits, *in personam*, by a mere personal citation *viis et modis*, such as by posting up such a citation on the Royal Exchange in London as is done in the Admiralty in England, or by edictal citation, as it is called . . . according to the practice of Scotland, there is no pretence to say that such modes of proceeding can confer any legitimate jurisdiction over foreigners who are non-residents, and do not appear to answer the suit, whether they have notice of the suit or not. The effects of all such proceedings are purely local; and elsewhere they will be held to be mere nullities.

The fact that the assumed jurisdiction is only of local character leads to two important consequences. First, this is only an apparent, and not a real exception; and secondly, as far as the international effect of judgments is concerned, there is no justification for maintaining ⁴ that the English courts claim a wider jurisdiction than they are willing to concede to the foreign courts.

Adverting to the anomaly on the side of the foreign jurisdiction, it is evident that the recognition of a foreign judgment on the ground

¹ In *Buchanan v. Rucker* (1808), 9 East 192, 194.

² S. 546 (8th ed., pp. 760-1); see further Blackburn, J., in *Schibbsby v. Westenholtz* (1870), L.R. 6 Q.B. 155, 160; Wright, J., in *Turnbull v. Walker* (1893), 67 L.T. 767, 769; *per curiam* in *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A.C. 670, 684.

³ They were introduced by the Common Law Procedure Act, 1852, ss. 18 and 19.

⁴ As J. G. Foster does in 16 *B.Y.B.I.L.* (1935), p. 96.

that the defendant is a national of the foreign country in question, is a concession by the English courts for which they do not claim a corresponding advantage. Here we have to deal with a genuine exception to the territorial limitation of jurisdiction since that type of jurisdiction is based upon the notion of unqualified personal allegiance. On principle, it would not be surprising if such a foreign judgment were accorded only local effect within the territory of the sovereign whose nationality the defendant possesses. It has, in fact, never been expressly decided that a foreign judgment against a defendant, who is a national of the foreign country in question but does not reside within its jurisdiction nor submit to it, can claim recognition in the English jurisdiction, but in support of this view several judicial dicta¹ can be quoted which were regarded as so weighty by Atkin, J.,² that this eminent Judge felt compelled to follow them. It can hardly be doubted that to-day this rule has so engrafted itself on English law that it must be considered as forming part of it although in appropriate cases the courts might admit exceptions thereto.³

II. COMPETENCE OF THE ENGLISH COURTS IN ACTIONS *IN PERSONAM*

Considering now the competence of the English courts in actions *in personam*, it is important to distinguish between the original jurisdiction which the courts exercise at common law and the assumed jurisdiction which was first conferred upon the courts by the Common Law Procedure Act, 1852⁴ and is now exercised by virtue of Order 11 of the Rules of the Supreme Court which are issued by authority of the Judicature Act.⁵

1. THE ORIGINAL JURISDICTION OF THE ENGLISH COURTS.

The original jurisdiction of the English courts is strictly based upon the two principles of presence and submission which have already been discussed in the general part; little need be added to those observations.

A. Jurisdiction based upon presence. The English courts are

¹ *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371; *Emanuel v. Symon*, [1908] 1 K.B. 302, 309; *Gavin Gibson & Co. Ltd. v. Gibson*, [1913] 3 K.B. 379, 388.

² In *Gavin Gibson & Co. Ltd. v. Gibson*, [1913] 3 K.B. 379, 388.

³ Cheshire, 3rd ed., p. 789.

⁴ Ss. 18 and 19.

⁵ To-day; Supreme Court of Judicature (Consolidation) Act, 1925, ss. 99, 100.

competent to entertain actions *in personam* against all persons who at the commencement of the proceedings are within the territorial jurisdiction of the courts¹ and can, therefore, personally be served with the process of the court.²

It is, as Lord Haldane³ observed,

the root principle of the English law about jurisdiction—that the judges stand in the place of the sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the courts have jurisdiction.

It is a peculiarity of English law that service of the writ is considered as the foundation of the jurisdiction, whilst in the countries which have based their system of laws on the Civil Law, the citation of the parties is "merely a *sine qua non* before effective action is allowed."⁴

The English jurisdiction extends over all persons within the territory, subjects and aliens alike,⁵ without regard to the length of time spent by the defendant within the jurisdiction, so that a person can be served with legal process and is consequently subject to the jurisdiction of the English courts though he is in England only on a fleeting visit.⁶ It would appear that even the presence of the defendant on board a foreign merchant vessel in English territorial waters would make him liable to service of the King's writ.

The decisive moment when the defendant must be within the jurisdiction is that of the *issue*⁷ and not of the *service* of the writ. If after the issue of the writ the defendant has left the jurisdiction (even though not for the purpose of evading service) so that personal service cannot be effected, an order for *substituted service* (Order 9) may be granted.⁸ Such service should be distinguished from *service out of the*

¹ The jurisdiction of the English courts in actions *in personam* extends to the territories of England, Wales, and the town of Berwick-on-Tweed, but not to Scotland or Ireland, the Isle of Man or the Channel Islands. A person on board a British man-of-war can also be personally served because the ship is, by a legal fiction, always considered to be situate within the jurisdiction (*Seagrove v. Parks*, [1891] 1 Q.B. 551).

² R.S.C., Order 9, r. 2.

³ *John Russell & Co. Ltd. v. Cayzer*, [1916] 2 A.C. 298, 302.

⁴ Lord Dunedin in *Johnson v. Taylor Bros. & Co. Ltd.*, [1920] A.C. 144, 154.

⁵ See *ante*, p. 382; see also *Graumann v. Treitel*, [1940] 2 All E.R. 188, 192.

⁶ *Carrick v. Hancock* (1895), 12 T.L.R. 59; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155; *Emanuel v. Symon*, [1908] 1 K.B. 302.

⁷ See O. 5, r. 11.

⁸ *Jay v. Budd* (1897), 77 L.T. 335; *Porter v. Freudenberg*, [1915] 1 K.B. 857, 887; but substituted service will not be allowed if it is improbable that the defendant will obtain notice of the intended proceedings through the method suggested for substituted service; *V. L. Churchill & Co. Ltd. v. Lonberg* (1941), 165 L.T. 274.

jurisdiction (Order II) which is only available if the defendant at the moment of the issue of the writ is outside the jurisdiction.

If the defendant has been forcibly brought or fraudulently inveigled into the jurisdiction, personal service on him is bad and will be set aside as an abuse of the process of the court.¹

B. Jurisdiction based on submission. The English courts are further competent to entertain, in certain instances, actions *in personam* if the defendant has consented to the trial of the case before those courts.² Jurisdiction based on submission is particularly important if it is doubtful whether the defendant will, at the commencement of the suit, be present in the English jurisdiction, or if it is certain that he will not be there. But parties are not at liberty in all proceedings *in personam* to elect the English *forum*. They may, however, generally do so where the parties are at liberty to arrange the details of the intended transaction at their discretion; e.g., in the case of actions based on contract.³

If the cause of action is a *contract*, the parties may stipulate before the institution of the suit that all disputes arising out of or in connection with the contract shall be decided by the English courts.⁴ The same effect is produced by a clause appointing a solicitor or other person resident in the jurisdiction as agent for the acceptance of the service of the writ on behalf of an (absent) party.⁵ The defendant may also by conduct submit to the jurisdiction of the English courts, e.g., by instituting there an action in the same cause, or by entering an unconditional appearance or pleading to the merits of the case.⁶ It should, however, be noted that, in all cases, service of the writ on the submitting defendant is necessary. If at the commencement of the suit he is not present in the jurisdiction and has not appointed an agent authorised to accept service, he may, by leave of the court, be served out of the jurisdiction according to Order II, rule 2a.

Whether, in case of actions based on *tort*, the parties can submit their dispute to an English court which would not otherwise be competent

¹ *Watkins v. North American Land & Timber Co. Ltd.* (1904), 20 T.L.R. 534; *Stein v. Valkenhuysen* (1858), E.B. & E. 65; Westlake, 7th ed., s. 180, p. 247; 1 Beale, 341.

² Dicey, 5th ed., Rule 56, p. 221; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, 161; *Copin v. Adamson* (1875), 1 Ex. D. 17, 19; *Tharsis Sulphur & Copper Co. Ltd. v. Société des Métaux* (1889), 58 L.J.Q.B. 435; *The Duplex*, [1912] P. 8.

³ See p. 382, *ante*.

⁴ *Copin v. Adamson* (1875), 1 Ex. D. 17, 19; see Order II, r. 2a, first alternative.

⁵ *Tharsis Sulphur & Copper Co. Ltd. v. Société des Métaux* (1889), L.J.Q.B. 435, 438; see Order II, r. 2a, second alternative.

⁶ *Bayle v. Sacker* (1888), 39 Ch. D. 249, 252; *The Duplex*, [1912] P. 8, 14.

is not definitely settled.¹ Whilst it seems clear that the jurisdiction of the English courts cannot, by consent of the parties, be extended to trespasses against foreign immovables, it is believed that, in the case of other torts, no valid argument can be advanced against a submission by consent, provided that a writ can be served within the jurisdiction on an agent of the (absent) defendant, or that for some other reasons the service of the writ is possible.² In the case of torts committed abroad, service out of the jurisdiction appears hardly feasible in the absence of any rule corresponding to rule 2a of Order 11. The substantive law governing such claims would be that which applies to all actions in tort (except maritime torts); i.e. the claim must be actionable by both English law and the foreign *lex loci delicti*.

2. THE ASSUMED JURISDICTION OF THE ENGLISH COURTS.

The original jurisdiction of the English courts is supplemented by the assumed jurisdiction which to-day³ is chiefly contained in the provisions of Order 11 of the Rules of the Supreme Court. The special cases where the English courts are authorised to extend their jurisdiction beyond the territorial limits are numerous and of great practical importance. The exercise of the assumed jurisdiction is safeguarded by a number of general restrictions which require consideration before the special cases of the assumed jurisdiction can be examined.

A. General conditions for the exercise of the assumed jurisdiction.

Service out of the jurisdiction is admitted only by special permission of the court (Order 2, rule 4) which is granted on application to the Practice Master.⁴ When considering the application, the court is free to exercise its judicial discretion which is, however, subject to re-examination on appeal. The discretionary character of the assumed jurisdiction is the characteristic feature⁵ of this type of jurisdiction, whereas, in the province of the original jurisdiction, a writ is taken out as a matter of course.

In the exercise of its discretion, which has to be based upon an

¹ *The Mary Moxham* (1875), 1 P.D. 43; see pp. 149, 165, *ante*.

² *The Duplex*, [1912] P. 8.

³ On the history of the assumed jurisdiction see Huddleston, B., in *Lenders v. Anderson* (1883), 12 Q.B.D. 50, 56; Chitty, J., in *Re Busfield* (1886), 32 Ch.D. 123, 124; du Parcq, L.J., in *George Monro, Ltd. v. American Cyanamid & Chemical Corp.* (1944), 60 T.L.R. 265, 267.

⁴ Or to the District Registrar, but the practice varies slightly in K.B.D., Ch.D. and P.D.A.D.; see *Yearly Practice*, notes to Order 11, r. 4.

⁵ See Slessor, L.J., in *Kroch v. Russell et Cie*, [1937] 1 All E.R. 725, 727; Lord Haldane in *Johnson v. Taylor Bros. & Co. Ltd.*, [1920] A.C. 144, 153; Lord Greene, M.R., in *Chaney v. Murphy* [1948] W.N. 130, 131.

examination of all the material facts, the court will be guided by three considerations which have been stated by Farwell, L.J., in *The Hagen*¹ as follows: first, the court will exercise the greatest care lest a foreigner who is not resident in the jurisdiction is put to the inconvenience of defending his rights here;² secondly, any doubt in the construction of the sub-heads of Order 11 will be resolved in favour of the foreigner; and thirdly, since the order is based upon an *ex parte* application by the plaintiff, a full and fair disclosure of all material facts is expected.³ The court will naturally not always go into the merits of the case,⁴ but it is entitled to take the subject-matter of the action into consideration,⁵ and will refuse permission if, for example, it is convinced that the plaintiff has no reasonable probability of succeeding in his action, or that the action falls only technically, and not in substance and spirit, under one of the sub-heads of the order,⁶ or that the plaintiff has not brought his action in good faith.⁷ Since the guiding principle for the court is the comparative advantage to all parties concerned in the furtherance of justice, it will be more favourably disposed to the application of a plaintiff if, for example, in consequence of his political views or for similar reasons, he cannot count on a fair hearing in the foreign courts where the action could alternatively be brought.⁸

The discretion which the court possesses when dealing with an application for service out of the jurisdiction enables it to confine that type of jurisdiction to those cases where the English court is *forum conveniens*. The onus is on the plaintiff to satisfy the court that it is more convenient for him to sue in the English court than elsewhere. This burden of proof is more than usually heavy when the rivalling foreign courts are those of Scotland and Northern Ireland. In these cases the plaintiff must aver affirmatively in his affidavit in support of the application that the English proceedings are comparatively less costly and more convenient than the alternative Scottish

¹ [1908] P. 189, 201; see also *George Monro, Ltd. v. American Cyanamid & Chemical Corp.* (1944), 60 T.L.R. 265; *The Brabo* [1948] P. 33.

² See also *per* Pearson, J., in *Société Générale de Paris v. Dreyfus Brothers* (1885), 29 Ch. D. 239, 242.

³ *Bloomfield v. Serenyi*, [1945] 2 All E.R. 646; *National Mortgage and Agency Company of New Zealand Ltd. v. Gosselin* (1922), 38 T.L.R. 832, 833.

⁴ *Société Générale de Paris v. Dreyfus Brothers* (1887), 37 Ch. D. 215, 223; *Badische Anilin und Soda Fabrik v. Henry Johnson & Co.*, [1896] 1 Ch. 25, 28.

⁵ *Bloomfield v. Serenyi*, [1945] 2 All E.R. 646.

⁶ *Johnson v. Taylor* (1919), 36 T.L.R. 62, 65; *Rosler v. Hilbery*, [1925] 1 Ch. 250, 254; *Kroch v. Rossel et Cie*, [1937] 1 All E.R. 725, 728; different considerations apply to contracts; see pp. 394-395, *post*.

⁷ *Watson & Sons v. Daily Record (Glasgow) Ltd.*, [1907] 1 K.B. 853, 858-9.

⁸ *Oppenheimer v. Louis Rosenthal & Co. A.G.*, [1937] 1 All E.R. 23.

and Northern Irish proceedings,¹ whereas, in cases where the alternative lies with other foreign courts, the plaintiff need not produce such evidence before this question has actually been raised in court.

Service out of the jurisdiction is effected in the following manner (Order II, rules 2, 4-8). If the defendant is a British subject, or a person present in one of the British dominions,² the writ itself is served on him, but, if the defendant falls in neither of these two categories, notice of the writ and not the writ itself is served upon him (Order II, rule 6). This distinction is due to the nature of the writ of summons as a royal command that can only be addressed to persons owing permanent or temporary allegiance to the King. Once service out of the jurisdiction has been duly effected, the defendant is as completely subjected to the jurisdiction of the English courts as if he had been personally served within the jurisdiction.³

B. Special cases of the assumed jurisdiction. We have now to consider the special cases where the courts may permit service out of the jurisdiction. These cases are:

Actions concerning land—

- (a) where the whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits) or the perpetuation or testimony relating to the title to land within the jurisdiction; (O. II, r. 1 (a)).
- (b) where any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside or enforced in the action; (O. II, r. 1 (b)).

Actions against persons domiciled or ordinarily resident within the jurisdiction—

- (c) where any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; (O. II, r. 1 (c)).

This very wide power permits the court to extend its jurisdiction over practically all personal actions against persons or corporations⁴ domiciled or ordinarily resident in England.

A person may be ordinarily resident at several places,⁵ but can be domiciled only at one place at a time.⁶ If it is possible to bring

¹ See O. II, r. 2; *Hume Pipe & Concrete Construction Co. v. Moracrete*, [1942] 1 K.B. 189.

² Eire is regarded as a British dominion; *Hume Pipe & Concrete Construction Co. v. Moracrete Ltd.*, [1942] 1 K.B. 189.

³ *Romer, L.J.*, in *Re Liddell's Settlement Trusts*, [1936] Ch. 365, 374.

⁴ Order 71, rule 1; what constitutes the residence of a corporation for purposes of jurisdiction has been explained at p. 350, *ante*.

⁵ *Re Norris* (1888), 5 Morrell 111; *Re Williams* (1873), 8 Ch. App. 690; *Ex parte Breull* (1880), 16 Ch. D. 487; *Drexel v. Drexel*, [1916] 1 Ch. 251.

⁶ See p. 72, *ante*.

a case within this general sub-rule, it will not be necessary to show that it falls also under another more specific sub-head,¹ though the latter course may be expedient in order to strengthen the case for the exercise of the court's discretion.

Actions concerning administrations and trusts—

- (d) where the action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument of which the person to be served is a trustee, which ought to be executed according to the law of England; (O. 11, r. 1 (d)).

It should be noted that, as far as the second alternative of this sub-rule is concerned, service out of the jurisdiction will only be granted if at least part of the trust property is actually within the jurisdiction at the period when the order is made. It is not sufficient that the aim of the action is to compel the defendant to transfer to England trust property which ought to be there.²

Actions concerning contracts—

- (e) where the action is one brought against a defendant (not domiciled or ordinarily resident in Scotland) to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract—
- (i) made within the jurisdiction, or
 - (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or
 - (iii) by its terms or by implication to be governed by English law,
- or is one brought against a defendant (not domiciled or ordinarily resident in Scotland or Ireland), in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction; (O. 11, r. 1 (e)).

This sub-head, which has been repeatedly extended, now covers practically all contracts connected in some way or other with the English jurisdiction. These provisions cannot, however, be relied on if the defendant is domiciled or ordinarily resident in Scotland. This qualification to the general rule cannot be overcome by basing the claim primarily on tort and adding an ancillary claim in contract,³ or by suing the Scottish defendant jointly with a person resident

¹ *Hadad v. Bruce* (1892), 8 T.L.R. 409.

² *Winter v. Winter*, [1894] 1 Ch. 420, 423.

³ *Waterhouse v. Reid*, [1938] 1 K.B. 743.

abroad and amenable to the jurisdiction of the Court under the provisions of the sub-head.¹

The sub-head, in effect, permits service out of the jurisdiction in the following four cases² which are disjunctive—

(i) where the contract has been concluded in the English jurisdiction. In this case jurisdiction may be assumed by the courts without regard to where the contract is to be performed or what the proper law of the contract is.

(ii) where the contract has been concluded by or through an agent within the jurisdiction. This alternative covers both the case where the contract was concluded by an agent on behalf of the foreign principal and the case where the agent was not authorised to conclude the contract but was merely empowered to mediate and solicit orders which were passed to his foreign principal and accepted or rejected by the latter abroad.³

(iii) where the proper law of the contract is English law.

(iv) where the contract has been broken within the jurisdiction.

The rule in case (iv) is remarkable in more than one respect and requires elucidation. Since a contract can only be broken where it has to be performed, the rule implies that performance was due within the jurisdiction of at least one of the obligations arising under the contract. The performance within the jurisdiction of the whole of the contract has never been considered necessary. It has always been regarded sufficient "if some part of it is to be performed within the jurisdiction, and if there is a breach of that part of it within the jurisdiction."⁴ It was, however, decided in *Johnson v. Taylor Brothers and Co., Ltd.*⁵ in 1919 that the part of the contract which was to be performed within the jurisdiction, "must be a part which according to the tenor of its terms was susceptible of individual performance in this country independently of the fate of other and distinguishable parts of the contract."⁶ The effect of that decision was that the courts were bound not to grant service out of the jurisdiction in respect of the breach abroad of a contract which was substantially to be performed there, an ancillary obligation only being performable here. Thereupon the Rules Committee substituted in 1921 the present sub-rule

¹ *Sassoon & Co. v. Graham & Co. and Oriental Navigation Co.* (1925), 133 L.T.R. 805.

² Dicey, 5th ed., pp. 251-4.

³ *National Mortgage and Agency Company of New Zealand v. Gosselin* (1922), 38 L.T.R. 832, 833.

⁴ Lindley, L.J., in *Rein v. Stein*, [1892] 1 Q.B. 753, 757.

⁵ (1919), 36 T.L.R. 62.

⁶ Per Lord Birkenhead, L.C., at p. 63.

which supersedes the rule in *Johnson v. Taylor* and restores the discretion of the Court to grant service out of the jurisdiction even where only an ancillary obligation has been broken within the jurisdiction.

The effect of this extension is of great practical importance, e.g., in the case of c.i.f. contracts having as their object the delivery of goods to purchasers in this country from vendors abroad. In such cases the delivery of the goods sometimes takes place at the foreign port (e.g., to an agent of the purchasers) but payment has to be effected at the port of destination, (i.e., within the jurisdiction) against delivery of the shipping documents.¹ If in such a case the foreign vendor breaks the contract, the main breach would occur at the place where the goods have to be delivered, i.e., outside the jurisdiction, and the non-delivery of the shipping documents within the jurisdiction would represent only the breach of an ancillary obligation. Under the new sub-rule such an ancillary breach enables the court to grant leave for service out of the jurisdiction whereas no such jurisdiction was vested in the court under the old sub-rule as interpreted in *Johnson v. Taylor*.

If a contract is broken by letter, such as occurs, in the case of a contract of sale, by a letter refusing the performance of the agreement contrary to its terms (anticipatory breach), or in the case of a contract of service, by a communication dismissing a servant without just cause (wrongful dismissal), it becomes necessary to establish exactly the place where the breach has occurred. If the broken obligation was to be performed within the jurisdiction, no particular difficulty arises because the contract is clearly broken at the place at which it should have been performed.² If, however, the particular obligation was not to be performed within the jurisdiction, the question may arise whether the breach occurred at the place from which the letter was despatched or at the place where it was received. It is established by authority that the former place is in law the place of breach.³ This rule has been criticised by Greer, L.J.,⁴ for its lack of logical consistency, and indeed it is difficult to understand why the accident of the place where the letter was posted should determine the place of breach. It would be more in accordance with principle to adopt, as the sole criterion of the place of breach, the place where the contract should have been performed.

¹ I.e. bill of lading, insurance policy, invoice.

² *Mutzenbecher v. La Aseguradora Española*, [1906] 1 K.B. 254, 260.

³ *Martin v. Stout*, [1925] A.C. 359, 368; *Cherry v. Thompson* (1872), L.R. 7 Q.B. 573; *Holland v. Bennett*, [1902] 1 K.B. 867; *Mutzenbecher v. La Aseguradora Española*, [1906] 1 K.B. 254.

⁴ In *Oppenheimer v. Louis Rosenthal & Co.*, [1937] 1 All E.R. 23, 25.

Actions concerning torts—

- (ee) where the action is founded on a tort committed within the jurisdiction; (O. II, r. 1 (ee)).
- (f) where any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed whether damages are or are not sought in respect thereof; (O. II, r. 1 (f)).

In these instances the Court will exercise its discretion in favour of the application only if the case is substantially connected with the jurisdiction, and not if the grounds for bringing the case within the wording of the subheads were merely technical ones. The principle in *Johnson v. Taylor*, which in the sphere of contracts has been superseded by the new sub-rule (e),¹ is still effective in the case of actions falling under sub-rules (ee) and (f).² Thus, the Courts will not permit service out of the jurisdiction if the tort was committed abroad and only some resultant damage was suffered within the jurisdiction,³ or if an injunction is sought for the principal purpose of attracting the jurisdiction of the English courts as regards a foreign tort otherwise not subject to the cognisance of those courts.⁴

Further, it was held in *Kroch v. Rossell & Cie*⁵ that service out of the jurisdiction should not be granted in the case of a foreigner resident abroad and without material, social or other connection with this country who sought to bring an action for libel in the English courts against a foreign newspaper, although a few copies of the paper had been distributed in England and the libel had, therefore, technically been published within the jurisdiction.

Actions against joint defendants—

- (g) where action is brought against any person out of the jurisdiction who is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction; (O. II, r. 1 (g)).

This sub-rule provides for the contingency of an action against several defendants, one at least of them being within the jurisdiction and the other or others being outside the jurisdiction. In such a case, service out of the jurisdiction against any of the latter defendants is only admissible if the following two cumulative conditions are satisfied—

- (i) if it can be shewn when application is made that the defendant

¹ See p. 393, *ante*.

² *Kroch v. Rossell et Cie*, [1937] 1 All E.R. 725, 728; *Rosler v. Hilbery*, [1925] 1 Ch. 250, 259; but see *Ellinger v. Guinness, Mahon & Co.*, [1939] 4 All E.R. 16.

³ *George Munro, Ltd. v. American Cyanamid & Chemical Corp.* (1944), 60 T.L.R. 265.

⁴ *De Bernales v. New York Herald*, [1893] 2 Q.B. 97 n.

⁵ [1937] 1 All E.R. 725; see also *Watson & Sons v. Daily Record (Glasgow) Ltd.*, [1907] 1 K.B. 853.

within the jurisdiction has already been served with the concurrent writ ;¹ and

(ii) if "according to the regular practice of the courts of this country"² it is possible to join the defendant who is outside the jurisdiction.

The second condition is satisfied not only if the joinder of parties is necessary in law, but also if the joinder is merely proper—a criterion that permits some scope for the exercise of the discretion of the courts. As Lord Esher, M.R., said in *Massey v. Heynes*,³ the courts have to ask themselves—

Supposing both parties had been within the jurisdiction would they both have been proper parties to the action ?

In this connection, the question, whether the liability of several persons depends upon one investigation, is material.⁴ On the other hand, if the defendant within the jurisdiction is not sued *bona fide*, if no probable cause of action exists against him, or if he has been "brought into the action simply to enable the plaintiff to bring the other defendant within the jurisdiction,"⁵ the Court will decline to grant service out of the jurisdiction. Here, as in case of sub-rules (ee) and (f), the doctrine of *Johnson v. Taylor*⁶ still prevails.

Actions concerning mortgages on movables—

(h) where the action is by a mortgagee or mortgagor in relation to a mortgage of personal property situate within the jurisdiction and seeks relief of the nature or kind following, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, re-conveyance, delivery of possession by the mortgagee, but does not seek (unless and except so far as permissible under sub-head (e) of this rule), any personal judgment or order for payment of any moneys due under the mortgage ; (O. 11, r. 1 (h)).

Actions under the Carriage by Air Act, 1932—

(i) where the action is brought under the Carriage by Air Act, 1932 ; (O. 11, r. 1 (i)).

¹ *Collins v. North British and Mercantile Insurance Co.*, [1894] 3 Ch. 228, 236 ; *Yorkshire Tannery and Boot Manufactory v. Eglinton Chemical Co.* (1884), 54 L.J. Ch. 81.

² *Massey v. Heynes* (1888), 21 Q.B.D. 330, 335.

³ (1888), 21 Q.B.D. 330, 338 ; see also *Lindley, L.J.*, in *Witted v. Galbraith*, [1893] 1 Q.B. 577, 579 ; Lord Greene, M.R., in *Chaney v. Murphy*, [1948] W.N. 130, 131 ; Morton, J., in *Ellinger v. Guinness, Mahon & Co.*, [1939] 4 All E.R. 16, 22.

⁴ *Ibid.*, per Lindley, L.J., at p. 338.

⁵ *Witted v. Galbraith*, [1893] 1 Q.B. 577, 579 ; *The Yorkshire Tannery and Boot Manufactory Ltd. v. The Eglinton Chemical Co. Ltd.* (1884), 54 L.J. Ch. 81, 83 ; *John Russell & Co. Ltd. v. Cayzer, Irvine & Co. Ltd.*, [1916] 2 A.C. 298 ; *Bloomfield v. Serenyi*, [1945] 2 All E.R. 646 ; *The Brabo*, [1948] P. 33.

⁶ (1919), 36 T.L.R. 62 ; *Ellinger v. Guinness, Mahon & Co.*, [1939] 4 All E.R. 16 ; see p. 394, ante.

Probate actions—

Order II, rule 2 provides that—

in Probate actions service of a writ of summons or notice of a writ of summons may by leave of the court or a Judge be allowed out of the jurisdiction.

Actions against partnerships carrying on business within the jurisdiction—

A foreign partnership carrying on business within the jurisdiction can, like an English partnership, sue or be sued under its firm style (Order 48A, rule 1). If in such a case it is feasible to serve the writ upon at least one partner within the jurisdiction, or upon the person in control of the principal place of business of the partnership within the jurisdiction (Order 48A, rule 3), the service has effect against all partners of the partnership including those outside the jurisdiction,¹ whereas otherwise it would be necessary to serve separately every one of the foreign partners outside the jurisdiction.²

Strictly speaking, the provisions of Order 48A do not, like those of Order II, extend the jurisdiction of the English courts beyond the territorial limits, but they determine the effect of service within the jurisdiction on a foreign partnership caught within the English territorial jurisdiction. Since in this case service within the jurisdiction is pre-requisite, the writ can be taken out as a matter of right.

III. COMPETENCE OF THE ENGLISH COURTS IN ACTIONS *IN REM*

1. IN GENERAL.

In considering the jurisdiction of the English courts over actions *in rem*, it should be remembered that most cases of that type of jurisdiction have already been investigated in the preceding chapters. This is, in particular, true with respect to actions concerning immovables³ or movables,⁴ and actions affecting the status of a person.⁵ Only the jurisdiction *in rem* of the English Admiralty Court remains to be considered.

¹ *Worcester City & County Banking Co. v. Firbank, Pauling & Co.*, [1894] Q.B. 784; *Hobbs v. Australian Press Association*, [1933] 1 K.B. 1.

² *Von Heilfeld v. Rechnitzer*, [1914] 1 Ch. 748; and see p. 360, *ante*.

³ See p. 164, *ante*.

⁴ See p. 380, *ante*.

⁵ See p. 312, *ante*.

2. ADMIRALTY ACTIONS *IN REM*.*

The Admiralty jurisdiction *in rem*¹ represents a peculiar kind of procedure which is available when it is sought to enforce a maritime lien, or in similar instances. A maritime lien exists on ship, cargo and freight for claims for damage caused by collisions,² for bottomry bonds or *respondentia*, and for seamen's wages or certain other services such as towage and pilotage. Actions for these claims as well as actions concerning the supply of necessities for, or the execution of repairs on, a ship are the main instances of Admiralty actions *in rem*. The objective of these proceedings is the arrest³ of ship or cargo⁴ and their sale by order of the court. The proceeds of the sale are distributed amongst the creditors in the manner and rank prescribed by the *lex fori*.⁵

The jurisdiction *in rem* of the English Admiralty Court is very wide;⁶ it extends to all cases where a maritime lien exists irrespective whether the facts giving rise to the lien occurred within the English jurisdiction, on the high seas, or in a foreign territorial jurisdiction. In particular, the Court has jurisdiction to adjudicate upon damage done by a ship to foreign land installations, as was decided in *The Tollen*⁷ where a British ship was sued for damages caused by a collision with a pier at Lagos, Nigeria. It has been pointed out earlier⁸ that this is a notable qualification of the *lex situs* as applicable to immovable property.

The jurisdiction *in rem* of the English Admiralty Court can only be invoked if it is possible to serve the *res* (i.e. the ship or the cargo) within the territorial jurisdiction of the Court, i.e. in an English port or within the three miles limit from the English coast-line.⁹ Substi-

* For further reading : Dicey, 5th ed., Rule 61, p. 269, and Appendix, Note 11 : "List of Admiralty Claims"; G. Price, *The Law of Maritime Liens*, London, 1940; G. Price, "Maritime Liens" in 57 L.Q.R. (1941), 409; G. Price, "The priority of maritime liens" in *J. Comp. Leg.* (1942), 38. For the history and effect of the writ *in rem*, see Jeune, J., in *The Dictator*, [1892] P. 304, 310; and Lord Wright in *Compañía Naviera Vascongada v. S.S. Christina*, [1938] A.C. 485.

¹ On maritime torts, p. 155, *ante*; on maritime contracts, p. 126, *ante*.

² *The Bold Buccleugh* (1851), 7 Moo. P.C. 267.

³ The arrest is a frequent but not a necessary incident in Admiralty proceedings *in rem*; *The Nautik*, [1895] P. 121, 124; *The City of Mecca* (1881), 6 P.D. 106, 112. The arrest vests custody but not possession of the arrested chattel in the Admiralty Marshal; *The Arantzazu Mendi*, [1939] A.C. 256, 260.

⁴ The issue of a warrant of arrest is only possible against a tangible thing. It is, therefore, not available against the freight separately, but the freight may be attached together with the ship or cargo; *The Kaleten* (1914), 30 T.L.R. 572.

⁵ See *ante*, p. 362.

⁶ Judicature Act, 1925 Sects. 22 and 33; see Scott, L.J., in *The Tollen*, [1946] P. 135, 147, 154. ⁷ [1946] P. 135. ⁸ Pp. 163-165, *ante*.

⁹ As regards bays, see *The Fagerness*, [1927] P. 311.

tuted service or service out of the jurisdiction is not admitted against the *res*. The service of the writ against a ship, freight or cargo on board is normally effected by nailing the writ on the mainmast, and if the cargo has been landed or transhipped, by placing the writ for a short time on the cargo.¹

It should be noted that an Admiralty action *in rem* does not necessarily lead to a judgment *in rem*.² The owner of the *res* may enter a personal appearance and defend the action, e.g., for the purpose of bailing out the ship and obtaining her release from arrest. In this case the defendant would be personally liable, even in excess of the value of the *res* against which the action was originally directed.³ The distinction between judgments *in personam* and judgments *in rem* is further important with respect to the title of the purchaser of the *res*; he acquires an absolute title only if the judgment is directed against the *res* and the *res* is sold accordingly, but in the case of proceedings which, having been started *in rem*, have continued against a person and resulted in a judgment against that person, the purchaser's title depends, as in every case of execution of a judgment *in personam*, on the title of his predecessor.⁴

IV. JURISDICTION OF THE ENGLISH COURTS TO STAY ACTIONS

If in the English courts two actions concerning the same cause of action are instituted, the Court, in the exercise of its inherent jurisdiction to prevent vexatious, oppressive and frivolous litigation,⁵ will compel the plaintiff to elect between the two proceedings and will, if necessary, stay one of the actions in order to protect the defendant from a harassing multiplicity of actions.

In the field of the conflict of laws, the following two problems involving the jurisdiction to stay concurrent actions are likely to arise—

(1) Have the English courts power to order a stay if the actions are concurrently instituted in the English and foreign courts?

(2) If so, upon what principles do the English courts exercise that jurisdiction?

¹ R.S.C., Order 9, rule 12.

² Dicey, 5th ed., p. 272, fn. m.

³ *The Dictator*, [1892] P. 304; *The Gemma*, [1899] P. 285; *The Duplex*, [1912] P. 8; *The Broadmayne*, [1916] P. 64, 76-7; *Compañía Naviera Vascongada v. S.S. Christina*, [1938] A.C. 485.

⁴ See p. 380, *ante*.

⁵ See also R.S.C., Order 25, rule 4, which, however, has not affected the inherent Common Law jurisdiction of the courts to stay or strike out frivolous, vexatious or oppressive actions or pleadings.

1. POWER OF THE ENGLISH COURTS TO STAY CONCURRENT ACTIONS IN ENGLISH AND FOREIGN COURTS.

Considering first the former question, it is worth while to reflect on the implications of an affirmative answer to it. Such an answer would not only imply that the English judge can stay proceedings in his own courts—a power which need hardly be specially mentioned—but also that he can restrain a person from proceeding with a case in a foreign court. Such a power can clearly be vested in the English courts only by virtue of a general principle of jurisprudence, and not by a mere English rule of procedure.

There can be no doubt that, in the case of concurrent English and foreign proceedings, the English courts have power to prevent multiplicity of actions, either by staying proceedings in the English¹ courts or by exercising their equitable jurisdiction and, by means of an injunction, restraining a party from instituting or continuing proceedings in a foreign court.² The general principle underlying this jurisdiction has been indicated by Bowen, L.J., in two pronouncements. In one case³ the learned judge observed—

I would rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end.

In the other case he said⁴—

It seems to me that the principle upon which a plaintiff is put to his election, when it is suggested that a double action is being pursued, is a branch of this general law. The reason you put him to his election, and compel him to decide whether he will go on with one or the other suit, is that the prosecution of the actions simultaneously appears to the Court to be necessarily attended with injustice. It is really a branch of the general law.

By virtue of this wide jurisdiction, the English courts are in a position to entertain pleas similar to the defences of *forum non conveniens* in Scottish⁵ law or of *lis alibi pendens* in continental law.

¹ *McHenry v. Lewis* (1882), 22 Ch. D. 397; *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch. D. 225; *Logan v. Bank of Scotland* (No. 2), [1906] 1 K.B. 141; *Egbert v. Short*, [1907] 2 Ch. 205.

² *Bushby v. Munday* (1821), 5 Madd. 297, 307; *Ellerman Lines Ltd. v. Read*, [1928] 2 K.B. 144, 151, 154-5; *Carron Iron Co. v. MacLaren* (1855), 5 H.L. Cas. 416; *Cohen v. Rothfield*, [1919] 1 K.B. 410, 413; *Turk Gemi Kurama v. Ithaka (Owners)*, [1939] 3 All E.R. 630.

³ *McHenry v. Lewis* (1882), 22 Ch. D. 397, 408.

⁴ *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch. D. 225, 233.

⁵ *Logan v. Bank of Scotland*, [1906] 1 K.B. 141, 148 *et seq.*

2. EXERCISE OF POWER TO STAY CONCURRENT ACTIONS.

If proceedings concerning the same cause of action have been instituted in the English and foreign courts simultaneously, the English courts will not stop either of those actions as a matter of course but will examine each case on its merits and order a stay or an injunction only if it is plain that the prosecution of both actions at the same time would result in vexation and annoyance to the defendant. The courts have refused to give a cut and dried definition of vexatious and oppressive litigation since that character "must vary with the circumstances of each case,"¹ but they are not easily induced to grant a stay since "to restrain a man from proceedings with an action which *prima facie* he has a right to bring and to prosecute is a very serious thing."²

The courts have, however, evolved certain rules for ascertaining the vexatious and oppressive character of concurrent proceedings, and those rules throw upon the party applying for a stay or an injunction a burden of proof which varies in weight according to the circumstances of the case. The main consideration is that the applicant must prove to the satisfaction of the court that no advantage could accrue to his opponent by bringing the several actions or prosecuting the several proceedings, and that, consequently, the stay would not cause him injustice.³ The advantages of instituting proceedings in the courts of different countries may be various in nature, and even a small but actual advantage would justify the prosecution of concurrent actions in different jurisdictions. A difference in remedy is the most obvious of such advantages, for instance, the plaintiff "might have a personal remedy in one country and a remedy only against the goods in another."⁴ Further, easier requirements of evidence, a more favourable calculation of damages, possibilities of a speedier or cheaper trial, a longer limitation of actions, and similar advantages of procedure would justify the institution and continuance of concurrent actions. On the other hand, advantages which exist only in the imagination of the plaintiff are not sufficient.⁵ Further, the courts would consider the prosecution of litigation as vexatious if it is so obviously incon-

¹ *Per* Bowen, L.J., in *McHenry v. Lewis* (1882), 22 Ch. D. 397, 408; *Eve, J.*, in *Cohen v. Rothfield*, [1919] 1 K.B. 410, 417.

² *Fletcher Moulton, L.J.*, in *In re Connolly Bros. Ltd.*, [1911] 1 Ch. D. 731, 746.

³ *Scott, L.J.*, in *St. Pierre v. South African Stores*, [1936] 1 K.B. 382, 398; *Lord Greene, M.R.*, in *Chaney v. Murphy*, [1948] W.N. 130.

⁴ *Jessel, M.R.*, in *McHenry v. Lewis* (1882), 22 Ch. D. 397, 401.

⁵ *Gorell Barnes, P.*, in *Logan v. Bank of Scotland (No. 2)*, [1906] 1 K.B. 141, 151.

venient to try the action in a particular tribunal that injustice to the defendant would ensue. Thus, they will stay English proceedings in cases where the cause of action arises entirely within a foreign jurisdiction, or is governed by the law of that country, or further most witnesses and documents are there, and the defendant has been served within the English jurisdiction whilst on a short visit to England¹ or for some technical reason.²

If concurrent actions have been instituted in the same jurisdiction, there frequently exists a *prima facie* presumption that the dou proceedings are vexatious, and in such cases the burden of proof is shifted from the party applying for a stay of proceedings to the party opposing the stay, who has then to prove the advantages resulting from the concurrent actions. If, on the other hand, concurrent actions are commenced in different jurisdictions, no such presumption can be invoked in favour of the applicant. He must, on the contrary "prove a substantial case of vexation resulting from the identity of proceedings, remedies, and benefits, or from the existence of some motive other than a *bona fide* desire to determine disputes."³ Such a burden of proof rests upon the applicant, not only if the alternative action is brought in a country outside the British Empire, but also where the plaintiff intends to proceed concurrently in another part of the British dominions, since the remedies in different parts of the Empire may be different from those available in England, e.g., in South Africa where Roman Dutch law prevails, or in Quebec where French procedure applies.³ That burden of proof, however, can be more easily discharged if the applicant can show that, in the alternative jurisdiction within the Empire, the procedure is substantially the same as in England, as is, for example, the case in some Crown Colonies.

If a person is involved in two concurrent actions without being the plaintiff in both proceedings, if, e.g., *A* brings an action against *B* in England and *B*, the defendant, brings a counter-action in another country, the English courts are even less inclined to exercise their jurisdiction to restrain the defendant from continuing the foreign proceedings. The fact that *B* has not commenced concurrent litigation speaks against any vexatious intention on his part, and makes it more difficult for the applicant to satisfy the Court that the foreign action is really entirely useless.⁴

¹ *Egbert v. Short*, [1907] 2 Ch. 205; *In re Norton's Settlement*, [1908] 1 Ch. 471.

² *Logan v. Bank of Scotland* (No. 2), [1906] 1 K.B. 141.

³ *Scrutton, L.J.*, in *Cohen v. Rothfield* (1919), 1 K.B. 410, 415.

⁴ *Ibid.*

V. PERSONAL EXEMPTIONS FROM THE JURISDICTION OF THE ENGLISH COURTS

In conclusion, the cases will be considered where parties are, for personal reasons, exempted from the jurisdiction of the English courts.

We shall deal first with the case of persons who cannot sue in the English courts, and then with the instances where persons cannot be sued in those courts.

1. PERSONS WHO CANNOT SUE (ALIEN ENEMIES).

A. In general. The only case where a person is not admitted to suit in the English courts is that of an alien enemy.¹

It is an obvious requirement of public policy² that for the duration of war³ all trading with the enemy, except by licence of the Crown, should be illegal; all subsisting contracts with alien enemies are suspended or sometimes dissolved;⁴ and all partnerships with them automatically dissolved, and alien enemies have no access to the King's Courts for the purpose of prosecuting actions or other affirmative applications.

An alien enemy is prevented from acting as plaintiff in a suit either by instituting new proceedings or by continuing a pending suit.⁵ His right of action is not lost, but suspended for the duration of the war, and it revives on the restoration of peace.⁶ On the other hand, it is still

¹ See on trading with the enemy, Dicey, 5th ed., p. 905, Appendix, Note 9; Sir Arthur McNair, *Legal Effects of War*, 3rd ed., 1948; G. J. Webber, *The Effect of War on Contracts*, 2nd ed., 1946; W. F. Trotter, *Law of Contract during and after War*, 4th ed., 1940.

² Willes, J., in *Esposito v. Bowden* (1857), 7 E. & B. 763.

³ A certificate of a Secretary of State that His Majesty is at war with a foreign power is conclusive evidence and it is irrelevant that according to international law the state of war has ceased to exist; *R. v. Bottrill*; *Ex parte Kuechenmeister*, [1947] 1 K.B. 45. On the conclusiveness of the certificate generally, see A. B. Lyons, "The Conclusiveness of the Foreign Office Certificate," in (1946) *B.Y.B.I.L.*, Vol. 23, p. 240.

⁴ In each case, it depends on the construction and effect of the contract whether it is merely suspended or "abrogated," i.e. dissolved as to its further performance. On principle, an executory contract with an alien enemy is only suspended, but if the contract enures to the benefit of the enemy, it is abrogated, *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.*, [1918] A.C. 260; *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 219; *N. V. Ledeboter and Van Der Held's Textielhandel v. Hibbert*, [1947] 1 K.B. 964. Shareholders in a British limited company, who have become alien enemies, are not entitled to receive notice of, or to vote in, a general meeting of the company; *In re Anglo-International Bank* (1943), 59 T.L.R., 312.

⁵ *Geiringer v. Swiss Bank Corpn.*, [1940] 1 All E.R. 406; but if he was a co-partner with English partners, he may be joined as a plaintiff if an action is brought in the partnership's firm style for the recovery of a debt due to the firm and arising from a pre-war transaction; *Rodriguez v. Speyer Brothers* (1919), 88 L.J. K.B. 147.

⁶ *Janson v. Driefontein Consolidated Mines*, [1902] A.C. 484, 499; *Geiringer v. Swiss Bank Corpn.*, [1940] 1 All E.R. 406.

possible during war to bring or continue an action against an alien enemy as defendant.¹ But the alien enemy cannot bring a counterclaim though he may plead a set-off *pro tanto* of the amount claimed.² The reason for these rules has been stated by Bailhache, J.,³ as follows—

To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief.

B. The definition of an alien enemy. The definition of an alien enemy is relevant not only for the proceeding pending in the English courts, but also for the continuance of commercial intercourse during the war, for, whilst trading with alien enemies is illegal, trade with other aliens, particularly neutrals, is unobjectionable and frequently necessary for the successful conduct of the war.

It is, therefore, incumbent on us to define precisely what an alien enemy is. Though the term has now been defined by the Trading with the Enemy Act, 1939, it is still important to consider the Common Law conception of an alien enemy because the Act covers only the law of trading, and is not directly applicable to the suspension of actions. Moreover, the Act saves expressly all rights and prerogatives of the Crown by Common Law.

(a) THE DEFINITION OF AN ALIEN ENEMY AT COMMON LAW. In the case of natural persons, English Common Law considers as the test of an alien enemy voluntary residence in enemy territory.⁴ The nationality or domicil of the person in question is immaterial. It is noteworthy that a British subject who in time of war resides voluntarily⁵ in enemy territory is, according to English law, an alien enemy.

For the purpose of determining civil rights a British subject or subject of a neutral state who is voluntarily resident or who is carrying

¹ *Robinson & Co. v. Continental Ins. Co. of Mannheim* (1915), K.B. 155; *Eichengruen v. Mond*, [1940] 3 All E.R. 148. In the case of a partnership, if some partners have become alien enemies, but one partner or manager has retained his friendly status and resides within the jurisdiction, a writ may be served under Order 48A, rule 3 (*ante*, p. 398), *Meyer v. Dreyfuss et Cie*, [1940] 4 All E.R. 157. The Court will be reluctant to dispense with service of the writ on a person resident in enemy territory, particularly in matters affecting the status of the parties, e.g., in divorce petitions, *Luccioni v. Luccioni*, [1943] 1 All E.R. 260.

² Dicey, 5th ed., p. 907; *Re Stahlwerk Becker Aktiengesellschaft's Patent*, [1917] 2 Ch. 272, 273, 276.

³ In *Robinson & Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155, 159.

⁴ Enemy territory is the territory of the enemy state and the area occupied and effectively governed and administered by the enemy power. *V/O Soufracht v. Gebr. van Udens Scheepvaart en Agentuur Maatschappij*, [1943] A.C. 203.

⁵ Not e.g., as a Prisoner of War, *Vandyke v. Adams*, [1942] 1 Ch. 155, or as a civilian who is prevented from escaping from enemy territory. *Boissevain v. Weil*, [1948] 1 All E.R. 893, 896.

on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of hostile nationality resident in hostile territory.¹

Conversely, subjects of the hostile state or persons domiciled in enemy territory, who reside in this country by the King's licence or are resident in an allied or neutral state, are not regarded as alien enemies.² Thus, subjects of the enemy state who have registered according to the English alien legislation and are consequently permitted to remain in this country during good behaviour or for a specified time,³ or even enemy subjects who, as a precautionary measure, have been interned in this country,⁴ can maintain an action in contract or tort in an English court, but an alien enemy who is interned, is not entitled to a writ of *habeas corpus* against the Crown or its agents in respect of his detention.⁵ Aliens, who are not alien enemies, can institute and continue proceedings in the English courts.⁶

As regards corporations, the following two types of corporations are generally considered as falling under the category of alien enemies, viz.,

- (i) corporations incorporated under the law of the enemy state, and
- (ii) other corporations if their affairs are controlled by persons of alien enemy character.

That the first class of corporations should at Common Law be regarded as alien enemies is not in accordance with the test of alien enemy character as applied to individuals and is, in fact, a matter of serious doubt. Incorporation corresponds to nationality, and should, in principle, be of no more relevancy than the nationality of an individual. It is hard to see why a corporation, which for formal reasons has been incorporated under the law of the enemy state but is entirely controlled by British subjects resident in England, should be treated as an alien enemy. It has, indeed, been decided that a corporation incorporated in a British possession overseas and simultaneously in an enemy state does not, by the latter fact alone, assume the character

¹ Lord Reading, C.J., in *Porter v. Freudenberg*, [1915] 1 K.B. 857, 869; *Daimler, etc. v. Continental Tyre, etc.*, [1916] 2 A.C. 307.

² *Usparicha v. Nobbe* (1811), 13 East 332, 341, 342.

³ *Princess Thurn and Taxis v. Moffitt*, [1915] 1 Ch. 58, 61.

⁴ *Schaffenius v. Goldberg*, [1916] 1 K.B. 284; *R. v. Bottrill*; *Ex parte Kuechenmeister*, [1947] 1 K.B. 45.

⁵ *R. v. Bottrill*; *Ex parte Kuechenmeister*, [1947] 1 K.B. 45. This rule applies even if the alien has lost enemy nationality during the war by decree of the enemy power because such change in the nationality is not recognised by English law; *R. v. Home Secretary*; *Ex parte L.*, [1945] 1 K.B. 7.

⁶ *Princess Thurn and Taxis v. Moffitt*, [1915] 1 Ch. 58; *Krauss v. Krauss* (1916), 35 T.L.R. 637.

of an alien enemy.¹ The view, however, that corporations of foreign nationality are, *ipso facto*, alien enemies is supported by a dictum of Lord Macnaghten² and is also in accordance with the definition given in the Trading with the Enemy Act, 1939.

That corporations of the second class are deemed to be alien enemies is in accordance with the test of alien enemy character applicable to individuals. The criterion of actual control of the corporation's affairs corresponds, as has been explained earlier,³ to the residence of natural persons. In consequence, corporations incorporated under English or neutral law but actually controlled by enemy individuals, are deemed to be alien enemies.

(b) THE DEFINITION OF AN ENEMY UNDER THE TRADING WITH THE ENEMY ACT, 1939. The definition of an enemy⁴ in the Trading with the Enemy Act, 1939, corresponds closely to that of an alien enemy as developed by the Common Law. Sect. 2 of the Act provides—

Subject to the provisions of this section, the expression "enemy" for the purposes of this Act means—

- (a) any State, or Sovereign of a State, at war with His Majesty,
- (b) any individual resident in enemy territory,
- (c) any body of persons (whether corporate or incorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy, or
- (d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty;

but does not include any person by reason only that he is an enemy subject.

Territory, which without being part of the territory of the enemy state is in the actual occupation of the enemy, is treated as enemy territory⁵; persons residing therein but being opposed to the occupation are "enemies" within the meaning of the Act,⁶ but that definition does not include persons detained in enemy territory against their will, e.g. prisoners of war.⁷

¹ *Nigel Gold Mining Co. v. Hoade*, [1901] 2 K.B. 849; see also *Daimler, etc. v. Continental Tyre, etc. Ltd.* (1916), 85 L.J. K.B. 1333, 1352 (*per* Lord Parker).

² In *Janson v. Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484, 497.

³ See p. 352, *ante*.

⁴ At Common Law the expression "alien enemy" is customary, and that the Act of 1939 uses the term "enemy." The term "enemy alien" is used in the Aliens Order, 1920 (as amended), Article 20, which deals with measures of public security and is made under the Aliens Restriction Act, 1914.

⁵ S. 15; a certificate of a Secretary of State furnishes conclusive evidence whether an area is in enemy occupation; compare *In re Anglo-International Bank* (1943), 59 T.L.R. 312, with *V/O Sovfracht v. Gebr. van Udens Scheepvaart en Agentuur Maatschappij*, [1943] A.C. 203.

⁶ Roxburgh, J., in *In re Hatch's Will Trusts; Public Trustee v. Hatch* (June 10, 1948); *contra, obiter*, Croom-Johnson, J., in *Boissevain v. Weil* [1948] 1 All E. R. 893, 896.

⁷ *Vandyeke v. Adams*, [1942] 1 Ch. 155.

2. PERSONS WHO CANNOT BE SUED.

We have now to consider the case where a foreign party, for personal reasons, is exempt from the jurisdiction of the English courts. Since these cases pertain properly to the province of Public International Law,¹ they are here dealt with only in brief.

A. Foreign sovereigns. No action will be entertained in the English courts against a foreign sovereign state or against the property of such a state unless that state has clearly waived its privilege after the jurisdiction of the English courts has been invoked. The same principle applies to actions in the English courts against the head of a sovereign state or against the property of that head, and the principle has further been extended to the United Nations and certain international organisations.²

The immunity of foreign sovereigns³ and their property from process in the English courts is of a dual character. Lord Atkin, in *Compañía Naviera Vascongada v. S.S. Christina*,⁴ drew "attention to the fact that there are two distinct immunities appertaining to foreign sovereigns," which immunities he defined as follows—

The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.

It is important to distinguish between these two immunities because their extent may not be the same.

With respect to the former, i.e., the immunity of the person of the foreign sovereign from adverse suit, it is well settled that this immunity covers acts done or property owned by the sovereign both in his public and private capacity. Thus, no action would lie in the English courts against a foreign sovereign who, whilst living in England as a

¹ Oppenheim's *International Law*, Vol. I, Peace, 6th ed., 1947, Part III pp. 687, 681; Wheaton, *International Law* (ed. Keith) 1, 239-44; Dicey, 5th ed. Rule 52, p. 192.

² Diplomatic Privileges (Extension) Act, 1944, Sect. 1; as amended by the Diplomatic Privileges (Extension) Act, 1946, Sect. 2; Diplomatic Privileges (United Nations and International Court of Justice) Order, 1947 (S.R. & O. 1947, No. 1772); and the S.R. & O.'s referred to on p. 413, n. 4, *post*.

³ This term includes both foreign sovereign states and the heads of foreign sovereign states (monarchs, presidents, etc.). The function and position of a head of state is explained in Oppenheim, *International Law*, Vol. I, 6th ed., p. 675.

⁴ [1938] A.C. 485, 490.

private individual under an assumed name, promised marriage to a lady but did not fulfil the promise.¹ Similarly, a foreign government which engages in commercial shipping cannot be sued in the English courts against its will for the return of freight overpaid.² Further, no action can be maintained in the English courts against a foreign government for the redemption of a loan issued by that government or for payment of interest on the loan,³ unless the foreign government has waived its privilege after the commencement of the suit.

As regards the second type of immunity, i.e., that of property belonging to or in the possession or under the control of the foreign sovereign,⁴ the extent of that immunity may not be so wide as that of the personal immunity. This is of practical importance in cases where only the property of the foreign sovereign and not his person are impleaded, e.g., in actions *in rem* against ships owned by foreign states.⁵ The proprietary immunity of the foreign sovereign may depend on the nature and character of the property involved, and, whilst the rule is clearly established that property used for public purposes, e.g., warships, or mailboats,⁶ are protected by the proprietary immunity, it is not yet definitely settled whether that type of immunity likewise extends to the sovereign's property employed for private purposes, e.g., vessels engaged in ordinary trading. That the proprietary immunity protects property of the sovereign employed for public uses was laid down by the Court of Appeal in *The Parlement Belge*⁶ and was confirmed by the House of Lords in *Compañía Naviera Vascongada v. S.S. Christina*.⁷ The facts of the latter case were as follows—

The *Christina*, a ship belonging to a Spanish company and registered at the port of Bilbao, had, during the Spanish Civil War, been requisitioned by the Spanish Government. At the time of the coming into force of the requisition decree, the *Christina* was outside the Spanish jurisdiction, but when the ship arrived at a British port, the Spanish Consul was able,

¹ *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149.

² *Compañía Mercantil Argentina v. United States Shipping Board* (1924), 40 T.L.R. 601, 602.

³ *Wadsworth v. Queen of Spain* (1851), 17 Q.B. 171; *Twycross v. Dreyfuss* (1877), 5 Ch. D. 605, 616; *Smith v. Weguelin* (1869), L.R. 8 Eq. 198; see further M. Schmitthoff, "The International Government Loan" in *Journal of Comparative Legislation*, 1937, 3rd Ser., Vol. XIX, p. 179, 190.

⁴ No immunity would appear to attach to property which is only claimed by a sovereign, but cannot be proved to belong to him or to be in his possession or control: *Compañía Naviera Vascongada v. S.S. Christina*, [1938] A.C. 485, 506; *Haile Selassie v. Cable & Wireless Ltd.* (No. 1), [1938] 1 Ch. 839, 847.

⁵ Another example where, in fact, only the proprietary immunity of a sovereign was in issue, is provided by *Vauvasseur v. Krupp* (1878), 9 Ch. D. 351.

⁶ (1880), 5 P.D. 197.

⁷ [1938] A.C. 485.

in the name of his Government, to obtain possession of the ship without breach of the peace.

Thereupon the owners of the *Christina* commenced an action *in rem* against the ship, claiming possession of the ship. The Spanish Government claimed immunity from proceedings *in rem* as regards the ship.

The House of Lords (Lords Atkin, Thankerton, Macmillan, Wright and Maugham) held that, by the requisition decree in conjunction with the acquisition of possession without breach of the peace, the vessel had become the "property" of the Spanish Government, since for the purposes of the rules on immunity the term "property" denotes not only movables belonging to, but also movables in the possession, or under the control, of the foreign sovereign. The Court further held that the *Christina* had been employed for public uses.

It was therefore unanimously decided that the Spanish Government was entitled to immunity from process *in rem* against the ship.

The facts of the *Christina* did not necessitate a decision on the point whether immunity can be claimed for property of the foreign sovereign employed for private purposes, and in particular for state-owned commercial vessels which, e.g., may be sued *in rem* for damage caused by a collision. Their Lordships, however, speaking *obiter*, expressed divergent views on that topic which for some time had attracted the attention of the commercial world.¹ Whilst Lord Wright thought that the differentiation between property used for public purposes and property used for private purposes is unknown to English Common Law, Lord Maugham vigorously expressed the view that, at Common Law, state-owned commercial vessels are not exempted from the process of the courts. Both Lord Thankerton and Lord Macmillan favoured the latter view, and Lord Atkin refrained from expressing, *obiter*, an opinion on that point. Though, therefore, the question is not yet conclusively settled² in English law, there is, it is believed, much force in the following observations of Lord Macmillan³—

When the doctrine of the immunity of the person and property of foreign sovereigns from the jurisdiction of the courts of this country was first formulated and accepted it was a concession to the dignity,

¹ See the Brussels Convention of 1926 which, in the words of Oppenheim, *op. cit.*, Vol. I, 6th ed., p. 769, n. 1, "embodies the general principle that ships (with their cargoes) operated or owned by governments for commercial purposes shall in time of peace be subject to ordinary maritime law and shall not enjoy . . . immunity"; see further the Draft Convention respecting the competence of courts in regard to foreign states, prepared by the Harvard Law School (1932). The United States and Soviet Russia do not claim immunity for ships operated by their agencies and engaged in commercial trading; see S. H. Brookfield, "The Immunity of Foreign States engaged in Private Transactions," *Journ. of Comp. Leg.*, 1938, Third Ser., Vol. 20, pp. 1, 7.

² The decision in *The Porto Alexandre*, [1920] P. 30, which was in favour of an extension of the proprietary immunity to state-owned commercial vessels, cannot longer be considered as authority in view of the doubts expressed in the *Christina* case as regards the correctness of the decision.

³ *Ibid.*, p. 409.

equality and independence of foreign sovereigns which the comity of nations enjoined. It is only in modern times that sovereign states have so far condescended to lay aside their dignity as to enter the competitive markets of commerce, and it is easy to see that different views may be taken as to whether an immunity conceded in one set of circumstances should to the same extent be enjoyed in totally different circumstances.

If the question arises in the English courts whether full sovereign status should be accorded to a particular State or individual, a letter of a Secretary of State¹ will provide conclusive evidence whether or not the Crown recognises the sovereign status of the state or individual in question. Such letter must be considered as a statement of the Crown itself, and, as has been said in one case—

if Her Majesty condescends to state to one of her Courts of Justice, that an individual cited before it is an independent sovereign, I think that statement must be taken as conclusive.²

A foreign sovereign may waive his privilege and may voluntarily submit to the jurisdiction of the English courts. In such a case the general rules determining the submission to the English jurisdiction by persons otherwise not subject thereto are modified in his favour.³ For example, a submission of the foreign sovereign prior to the institution of proceedings would be of no effect; "it is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction."⁴ It has, consequently, been held that a foreign sovereign state, which had agreed to an arbitration clause in a contract, might, after an award had been made against it, plead privilege in proceedings to enforce the award. If a foreign sovereign as plaintiff invokes the jurisdiction of the English courts, he submits to all measures incidental to the action, but a counter-claim of the defendant exceeding the amount claimed from him or otherwise "outside of and independent of the subject-matter" of the action would not be permissible.⁵

B. Foreign diplomatic agents. Foreign diplomatic agents, e.g., ambassadors, ministers or *chargés d'affaires*, who are duly accredited

¹ *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149; *Duff Development Co. Ltd. v. Government of Kelantan*, [1924] A.C. 797.

² *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149, 162.

³ *Viscount Cave in Duff Development Co. v. Kelatan Government*, [1924] A.C., 797, 810; *The Arantzazu Mendi*, [1939] A.C. 256; *R. v. A.B.*, [1941] 1 K.B. 454.

⁴ *Per Lord Esher, M.R.*, in *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149, 159.

⁵ *The Newbottle* (1885), L. R. 10 P.D. 33; *South African Republic v. La Compagnie Franco-Belge Du Chemin de Fer du Nord*, [1898] 1 Ch. 190, 198; *U.S.S.R. v. Belaiew* (1925), 134 L.T. 64.

to the Crown as representatives of their sovereigns, are equally exempt from the English jurisdiction.¹

The privilege of diplomatic agents was confirmed by the Diplomatic Privileges Act, 1708, Sect. 3,² which is merely declaratory of the Common Law.³ The privilege extends also to members of the family of the diplomatic agent if living with him, to his diplomatic staff, e.g., counsellors, secretaries and clerks, and to his domestic servants, e.g., his chauffeur.⁴ It does not cover consular officers, but persons combining diplomatic and consular functions may claim the privilege.⁵ The certificate or letter of a Secretary of State is conclusive evidence in the English courts of the diplomatic status of the person in question.⁶

The privilege of the diplomatic agent does not attach to him in his own right, but because he is the *représentative* of his sovereign. The privilege is, therefore, instantly lost upon his dismissal from the services of that sovereign, but,⁷ if he has been recalled or has otherwise discharged his diplomatic mission, the privilege would continue to exist so long as he is reasonably occupied in winding up his affairs and preparing his return, even though his successor might already be functioning.⁸

The privilege protects ambassadors or other envoys, as far as their public and private acts are concerned, and covers equally their public and private property to the same extent as the proprietary immunity of sovereigns.⁹ It is, however, restricted as regards persons in the service of the envoy. These persons forfeit the privilege when engaging in trade and can, then, be impleaded like ordinary traders.¹⁰

The privilege of the diplomatic agent or of persons in his service can be waived with the consent of the sovereign whom he represents or of the official superior of the agent,¹¹ but as in the case of the sove-

¹ During the Second World War, diplomatic immunities were accorded to members of foreign Allied Governments (and certain National Committees) which for the time being were established in the United Kingdom; Diplomatic Privileges (Extension) Act, 1941, Sect. 1.

² 7 Am. c. 12; T. Mervyn Jones, "Immunity of Servants of Diplomatic Agents," 22 (3rd Ser.) *J. Comp. Leg.* (1940), 19.

³ Lord Campbell in *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 114; Swinfen Eady, L.J., in *In re Suarez*, [1918] 1 Ch. 176, 192; and *The Amazone*, [1940] 1 All E.R. 269.

⁴ *Parkinson v. Potter* (1885), 16 Q.B.D. 152, 160; *Engelke v. Musmann*, [1928] A.C. 433. The privilege can be invoked though the person in question is a British subject, *Macartney v. Garbutt* (1890), 24 Q.B.D. 368.

⁵ *Parkinson v. Potter* (1885), 16 Q.B.D. 152; *Engelke v. Musmann*, [1928] A.C. 433.

⁶ *Engelke v. Musmann*, [1928] A.C. 433.

⁷ *R. v. A.B.* (1941), 1 K.B. 454; *Marshall v. Critico* (1808), 9 East 447.

⁸ *Musurus Bey v. Gadban*, [1894] 1 Q.B. 533, 541.

⁹ *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94.

¹⁰ The Diplomatic Privileges Act, 1708, s. 5; *Taylor v. Best* (1854), 14 C.B. 487.

¹¹ *In re Suarez*, [1918] 1 Ch. 176, 192-3; *Taylor v. Best* (1854), 14 C.B. 487; *Dickinson v. Del Solar*, [1930] 1 K.B. 376, 380.

reign himself¹ such waiver would be effective only after the jurisdiction of the English courts has been invoked. As long as a person is protected by diplomatic privilege, the Limitation Act does not run against his creditors.²

C. Foreign representatives of international organisations. The privilege of diplomatic agents and their servants has been extended by the Diplomatic Privileges (Extension) Acts, 1944–1946, to certain persons connected with the work of the United Nations,³ the International Court of Justice,³ and some international organisations⁴ and conferences, and to certain members of their staffs and families. The statutory regulation follows closely the law that was evolved before the coming into force of the Acts and has been explained earlier. Two points are noteworthy: first, the various immunities and privileges are listed, in a Schedule to the principal Act,⁵ as follows—

1. immunities and privileges of the organisation.
2. immunities and privileges of high officers, persons on missions and government representatives.
3. immunities and privileges of other officers and servants.
4. immunities and privileges of representative's staff and of high officer's families.

Secondly, the Secretary of State is required to publish a list of persons entitled to immunities under the Acts in the London, Edinburgh and Belfast Gazettes, and to amend the list as the occasion demands.⁶

¹ See p. 411, *ante*.

² *Musurus Bey v. Gadban*, [1894] 1 Q.B. 533.

³ Diplomatic Privilege (Extension) Act, 1946, s. 2; Diplomatic Privileges (United Nations and International Court of Justice) Order, 1947 (S.R. & O. 1947, No. 1772).

⁴ The Acts have been made available, *inter alia*, to: U.N.R.R.A. (S.R. & O. 1945, No. 79); The Refugees Committee (S.R. & O. 1945, No. 84); The Transport Organisation, and War Crimes Commission (S.R. & O. 1945, No. 1211), The European Coal Organisation (S.R. & O. 1946, No. 895); see generally, Diplomatic Privileges (General Amendment) Order, 1946, No. 2202.

⁵ The Schedule is reprinted, in the amended form, in the Second Schedule to the Act of 1946.

⁶ Sect. 1 (3) of the Act of 1944.

CHAPTER XVI

JURISDICTION OF FOREIGN COURTS *

I. JURISTIC BASIS OF THE RECOGNITION OF FOREIGN JUDGMENTS

Problems connected with the jurisdiction of foreign courts usually arise in the English conflict of laws in the following circumstances. When a foreign court has passed judgment in a law suit, the successful party may attempt to make use of that judgment in the English jurisdiction either as plaintiff, i.e., by seeking to enforce the judgment here, or as defendant, i.e., by pleading it in bar to a claim raised against him here.¹ In both cases, the general problem that falls to be decided by the English courts is: Can the judgment of a foreign court claim recognition within the ambit of the English jurisdiction, and if so, on what grounds?

In answer to this question three theories have been propounded which we will examine in turn. We are not absolved from this task by the practical consideration that—

it would be impossible to carry on the business of the world if courts refused to act upon what has been done by other courts of competent jurisdiction.²

1. NO DIRECT ENFORCEMENT OR MERGER OF A FOREIGN JUDGMENT.

A foreign judgment cannot be enforced directly in the English jurisdiction, apart from the special cases where such enforcement is admitted by Act of Parliament.³ Whilst in some civil-law countries⁴ as, e.g., France, Germany and Italy,⁵ foreign judgments are, upon certain requirements⁶ (mostly including that of reciprocity), admitted

* For further reading: Professor H. C. Gutteridge, "Reciprocity in regard to foreign judgments," 13 *B.Y.B.I.L.* 1932, 49; H. E. Read, "Recognition and Enforcement of Foreign Judgments," *Harvard Studies in the Conflict of Laws*, Vol. II, 1938, Cambridge (Mass); Foote, 5th ed., p. 592 *et seq.*

¹ Piggott, *Foreign Judgments*, Vol. I, p. 8.

² *Per James, L.J.*, in *Re Davidson's Settlement Trusts* (1873), L.R. 15 Eq. 383, 386.

³ See E. G. Lorenzen, "The Enforcement of American judgments abroad," in 29 *Yale Law Journal* (1920), 269, 282.

⁴ France: Art. 546, Code Civ. Proc.; Germany: Sect. 722, Code Civ. Proc.; Italy, Art. 559, Code Civ. Proc.

⁵ See Gutteridge, *loc. cit.*, at pp. 51, 54 *et seq.*; T. M. de Moor, "The Allied Maritime Courts," 58 *L.Q.R.* (1942), 45.

to direct execution, such admittance would be contrary to the theory of the Common Law which never loses sight of the fact that a foreign judgment is the order of a foreign sovereign who cannot command, as such, obedience outside his own territory.¹ At Common Law the problem is, therefore, truly one of recognition, and not of enforcement. Not even in the United States has the Common Law doctrine been abandoned with respect to the admission of the judgments of one state in the sister states. According to the "full faith and credit" clause of the Constitution, supplemented by the Congressional Act of May 26th, 1790, the judgment of a state for payment of money is, in the words of Mr. Justice Wayne ²—

made a debt of record not examinable upon the merits, but it does not carry with it into another state the efficiency of a judgment upon property or persons, to be enforced by execution.

The recognition of a foreign judgment in the English courts is, further, not based on what might be called the doctrine of merger. At Common Law a security of lower order merges into a security of higher nature for the same debt. The judgment of an English court of record for the payment of a sum of money creates, by operation of law, a "contract" of record, the highest kind of security for a debt, and consequently the original cause of action—whether it was a simple contract or a contract by deed—merges into the judgment and is extinguished. The doctrine of merger does not apply to foreign judgments because foreign courts are not courts of record in the English sense.³

Since the original cause of action does not merge into the decision of the foreign court, a party is at liberty to abandon the foreign judgment and to base his claim on the original cause of action. Consequently, a party who has obtained judgment abroad, and desires to take proceedings in England has, apart from a statutory exception,⁴ two courses open, namely either to rely on the judgment or to sue on the original cause of action.⁵

¹ *Restatement*, Para. 433, p. 517.

² In *M'Elmoyle v. Cohen* (1839), 13 Pet. 312, 324; see p. 63, *ante*.

³ *Hall v. Obder* (1809), 11 East 118, 123-4; *Bank of Australasia v. Harding* (1850), 9 C.B. 661, 686-7, 688; *In re Henderson: Nouvion v. Freeman* (1887), 37 Ch. D. 244, 250; *Read, loc. cit.*, p. 116.

⁴ See p. 443, *post*.

⁵ *Continental Lines Société Anonyme v. W. H. Holt & Sons* (1932), 43 Ll. L. Rep. 392. A different problem arises if the foreign *lex fori*, like English internal law, provides for a merger and thereby extinguishes the original cause of action. On principle, the party would, in such a case, be compelled to rely exclusively on the judgment (*Restatement*, comment to subsection 1, Para. 450, p. 536) but there exist *dicta* of Wilde, C.J., and Cresswell, J., in *Bank of Australasia v. Harding* (1850), 9 C.B. 661 to the contrary.

2. RECOGNITION NOT BASED ON THE COMITY OF NATIONS.

It has further been maintained that the recognition of foreign judgments in English law is due to the comity of nations. This theory, supported by Story¹ and by some *dicta* in older cases,² is based on the following considerations, viz., that a judgment being a command of a sovereign pronounced by his judicial representatives cannot produce directly extraterritorial effect, but may, on certain conditions, be admitted by other sovereigns for reasons of convenience and international courtesy and in the expectation that other sovereigns may reciprocate.

The assumption that comity is the cause for the recognition of a foreign judgment leads, if pursued to its logical conclusion, to the remarkable result that recognition in the municipal sphere can only be accorded to judgments of those foreign sovereigns who in their turn recognise the judicial pronouncements of English courts, whereas recognition has to be withheld from judgments of other sovereigns. The requirement of reciprocity is the logical outcome of the doctrine of comity.³

The idea that the recognition of a foreign judgment is based on comity, and its offshoot, the requirement of reciprocity, is rejected by English law but accepted—though not without objections⁴—in the United States where the Supreme Court has, in *Hilton v. Guyot*,⁵ refused recognition to a French judgment because in France American judgments were examinable on their merits.

The principal reason why English judges⁶ and writers⁷ are to-day unanimously against the doctrine of comity and the requirement of reciprocity has been expressed by Lord Brougham⁸ in *Warrender v. Warrender* as follows—

The courts of England can hardly be said to act from courtesy, *ex comitate*, but *ex debito justitiæ*.

¹ Story, s. 598; and *Bradstreet v. Neptune Ins. Co.* (1839), 3 Sumn. 600, 608. Further, Figgott, *op. cit.*, Vol. I, p. 13.

² Ellenborough, C.J., in *Power v. Whitmore* (1815), 4 M. & S. 141, 150; Lord Wensleydale in *Fenton v. Livingstone* (1859), 3 Macq. 497, 548; Sir Robert Phillimore in *Messina v. Petrocochino* (1872), L.R. 4 P.C. 144, 157.

³ Blackburn, J., in *Schibsby v. Westenholtz* (1870), 6 Q.B. 155, 159; 2 Beale, 1380, denies this.

⁴ 2 Beale, 1389: "The doctrine of reciprocity is not only unsound in theory, but also in its practical results."

⁵ (1895), 159 U.S. 113.

⁶ See the cases quoted at p. 418, *post*, note 2; and *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 530; Ward, V.C., in *Liverpool Marine Credit Co. v. Hunter* (1867), L.R. 4 Eq. 62, 68.

⁷ Dicey, 5th ed., p. 7; Gutteridge, *loc. cit.*, p. 52; Cheshire, 3rd ed., p. 765.

⁸ (1835), 2 Cl. & Fin. 488, 530.

It would, indeed, be strange if the justice which our courts have to dispense were influenced by considerations of utility or retaliation. It is the task of the legislature and the executive¹ to be guided by considerations of expediency, and we are, therefore, not surprised at encountering the requirement of reciprocity in the cases where, by statutory authority, the judgments of a foreign state can be directly enforced in the English jurisdiction.²

Moreover, the theory of comity breaks down on the ground that, in the words of Professor Gutteridge,³—

if effect is given to a foreign judgment by an English court, it is not the foreign judgment which is enforced, but the right acquired under such judgment.

There is no necessity to resort to comity as a kind of international custom between sovereign powers if it is not overlooked that, when referring to the recognition of a foreign judgment, what is actually meant is the recognition of the private right that is created by the judgment and not the enforcement of a foreign judicial act of state. The theory of comity is incompatible with the vested right doctrine.

3. RECOGNITION BASED ON LEGAL DUTY TO OBEY FOREIGN JUDGMENT

The statement, that it is not the pronouncement of a foreign sovereign authority, but the private right created thereby which commands recognition in the English courts, contains the clue to the solution of the problem. "The true basis upon which the Anglo-Dominion authorities . . . place the recognition of a foreign judgment is," as Professor Read⁴ observes, "that it proves the fact that a vested right has been created through the judicial process by the law of a foreign law district."

Subject to compliance with certain requirements,⁵ the decision of a foreign court imposes upon the parties against whom the decision is given a legal duty to obey it. To this legal *duty* corresponds the *right* of the persons in whose favour the decision has been given that the foreign judgment should be obeyed. That a pronouncement of the sovereign power may impose on private persons a legal duty which gives rise to corresponding vested rights of others is well known from other provinces of English law, e.g., the legislature may create, by statute, a legal duty to take care, and any person belonging to

¹ Scrutton, L.J., in *Luther v. Sagor*, [1921] 3 K.B. 532, 556-7.

² See pp. 440, 442, *post*. ³ *loc. cit.*, p. 52. ⁴ Read, *loc. cit.*, pp. 121-2.

⁵ See p. 419, *post*.

the class of persons for whose benefit and protection the duty has been imposed, may bring an action for statutory negligence against the wrongdoer.¹

The view that the recognition of a foreign judgment in the English jurisdiction is based on the assumption that the foreign judgment creates a new legal obligation is firmly established by numerous decisions² and accepted by most writers on the subject.³ It has been expressed by Blackburn, J.,⁴ in the following terms—

The true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell v. Smyth*⁵ and again repeated by him in *Williams v. Jones*,⁶ that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

The theory of legal duty is sometimes stated in different terms. It is said that the enforcement of a foreign judgment for the payment of a fixed sum of money is based on the fiction that the judgment creates a debt or quasi-contractual obligation on the part of the defendant, so that an action in the English courts upon a foreign judgment has to be treated as an action in either debt or *assumpsit*.⁷ Fictions of that kind may have been necessary before the abolition of the forms of actions, in order to make technically possible the recognition in the English jurisdiction of judicially created foreign rights. After the abolition of the forms of actions,⁸ such fictions are no longer required and only obstruct the ascertainment of the true principles of law.⁹ However, it is not necessary to enlarge on this subject which, to-day, is of purely academic interest. For, as Professor Gutteridge observes¹⁰—

¹ *Groves v. Wimborne*, [1898] 2 Q.B. 402.

² *Godard v. Gray* (1870), L.R. 6 Q.B. 139; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155; *Russell v. Smyth* (1842), 9 M. & W. 810; *Williams v. Jones* (1845), 13 M. & W. 628; *In re Henderson : Nouvion v. Freeman* (1887), 37 Ch. D. 244; (1889), 15 App. Cas. 1; and the Australian case of *Berry v. Shead* (1886), 7 N.S.W.R. 39, 53.

³ Dicey, 5th ed., p. 17; Foote, 5th ed., p. 393; Prof. H. C. Gutteridge, *loc. cit.*, p. 52; Cheshire, 3rd ed., p. 765.

⁴ In *Schibsby v. Westenholz* (1870), 6 Q.B. 155, 159.

⁵ (1842), 9 M. & W. 810.

⁶ (1845), 13 M. & W. 628.

⁷ *Grant v. Easton* (1883), 13 Q.B.D. 302, 303.

⁸ By the Common Law Procedure Act, 1852, s. 2.

⁹ Prof. Winfield, *Province of the Law of Torts*, 1931, p. 150; Dicey, 5th ed., p. 400; Westlake, 7th ed., para. 311, p. 394.

¹⁰ *Loc. cit.*, p. 52.

the doctrine of an "acquired right" explains the reason for the enforcement of a foreign judgment and the theory of the nature of the right, whether it be based on quasi-contractual liability or on general principles of Private International Law, indicates the character of the procedural method for its enforcement.

II. RECOGNITION OF FOREIGN JUDGMENTS

1. REQUIREMENTS OF RECOGNITION.

We proceed now to a consideration of the requirements which have to be satisfied at Common Law if the judgment of a foreign court is to be recognised as producing effect in the English jurisdiction. These four requirements are—

1. The decision for which recognition is claimed must be a judgment, i.e., it must represent the result of an application of the judicial method or process.
2. The judgment must have been given by a court of competent international jurisdiction.
3. The judgment must be final.

These conditions have been summarised by Cotton, L.J., in *In re Henderson : Nouvion v. Freeman*¹ as follows—

If he—i.e., a party—elects to proceed on the foreign judgment, then he must shew that the matter has been adjudicated upon by a competent court, and that the adjudication is final and conclusive.

It should be further noted that—

4. according to the Limitation Act, 1939²—"an action shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable."

A. Observance of judicial process. The authorities concur that only a *judgment* (and not, e.g., an executive order of a foreign authority) can claim recognition in the English jurisdiction.³ There can be no judgment without the observance of the judicial process, and that implies that certain minimum requirements of natural justice must have been complied with, such as that the court must be com-

¹ (1887), 37 Ch. D. 244, 250; see also Lindley, M.R., in *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790.

² S. 2 (4).

³ Cotton, L.J., in *In re Henderson : Nouvion v. Freeman* (1887), 37 Ch. D. 244, 251; Lord Esher, M.R., in *Voinet v. Barrett* (1885), 55 L.J. Q.B. 39, 41; Channell, J., in *Robinson v. Fenner*, [1913] 3 K.B. 835, 842; Lord Campbell in *Bank of Australasia v. Nias* (1851), 16 Q.B. 717, 735; Shadwell, V.C., in *Price v. Dewhurst* (1837), 8 Sim. 279, 305-6; Dicey, 5th ed., 393; *American Restatement*, Paras. 71, 75, p. 429; 2 Beale, 1364-8.

posed of impartial persons,¹ and that reasonable notice of the proceedings and an opportunity to be heard should be given to the parties. It is said in the American *Restatement* that a judgment

implies a determination by a disinterested body after notice and an opportunity to be heard. A court is impartial when the judge or judges are not personally interested in the suit either as parties or as privies, or are not directly interested in the result of the suit.

The decision for which recognition is claimed must have been reached by means of the judicial process but this does not mean that the procedure or the rules of evidence observed in the foreign court must be similar to the practice prevailing in the English courts. Nor does it follow that a re-examination of the merits of the case² is admissible in the English courts. On the contrary, it will be seen later³ that a foreign judgment that satisfies the requirements for recognition is not refused recognition merely on the ground that it is wrong in fact or in law. It is, further, never to be presumed that the courts of a foreign country have neglected the minimum requirements of natural justice.⁴ The restricted scope of such terms as "natural justice" or "observance of judicial process" has been indicated by Channell, J.,⁵ in the following passage—

So far as I can see, all the instances given of what is "contrary to natural justice" for the purpose of preventing a foreign judgment being sued on here are instances of injustice in the mode of arriving at the result, such as deciding against a man without hearing him or without having given him notice or the like.

An illustration of the rule that a foreign decision, pronounced in proceedings of which the defendant had no notice, is not recognised in the English jurisdiction, is afforded by *Rudd v. Rudd*.⁶

In that case a married couple had their matrimonial domicile in England. Subsequently, the husband went to America and settled down in a small town in the State of Washington, whereto by law the matrimonial domicile was transferred. He then instituted divorce proceedings against his wife, who had never followed him to America, in a court of the State

¹ *Price v. Dewhurst* (1837), 8 Sim. 279.

² *Jacobson v. Frachon* (1928), 138 L.T.R. 386.

³ See p. 431, *post*.

⁴ Lord Denman, C.J., in *Henderson v. Henderson* (1844), 6 Q.B. 288, 298.

⁵ In *Robinson v. Fenner*, [1913] 3 K.B. 835, 842-3.

⁶ [1924] P. 72; contrast the facts of this case with those in *Pemberton v. Hughes*, [1899] 1 Ch. 781; the case of *Buchanan v. Rucker* (1808), 9 East 192, which is sometimes quoted in support of the rule is based on different considerations. In *Rudd v. Rudd* the foreign court was internationally competent because it was the court of matrimonial jurisdiction; in *Buchanan v. Rucker* the court was not internationally competent because the assumed jurisdiction has only local and not international character.

of Washington. According to the practice of that court, notice of the divorce action was sent by registered letter to the last known address of the wife in England. The notice, however, never reached her because the address was inaccurate. In addition, notice of the summons in the American action was published several times in the local newspaper of the place where the husband lived. The American court then pronounced a decree of divorce.

The wife, who had no notice of these proceedings and heard of them much later, petitioned the English court for a decree for restitution of conjugal rights. The petition was brought by the wife for the purpose of testing the validity of the American divorce and her counsel declared frankly that she desired to have her petition dismissed.

Horridge, J., however, taking the view that the American divorce decree had no effect in England, for the reason that the wife had had no notice of the American proceedings against her, made the restitution decree for which she petitioned.

B. Competence of the foreign courts. The second requirement for the recognition of a foreign judgment in the English jurisdiction is that the judgment must have been pronounced by a court of competent jurisdiction.

(a) THE FOREIGN COURT MUST HAVE INTERNATIONAL JURISDICTION. It should be noted that the only jurisdiction which matters in this connection is the international jurisdiction of the foreign court and that it is irrelevant whether or not the court is entitled under its municipal law of procedure to adjudicate upon the issue.¹ It will be remembered that the international jurisdiction of the courts, English and foreign alike, is based, in actions *in personam*, on the twin principles of presence and submission; in actions *in rem*, on the principle of the local situation of the *res* within the territorial jurisdiction of the court; and, in actions savouring of *res*, on special considerations due to the nature of status as a creation of law.

The fact that the recognition of a foreign judgment in the English jurisdiction depends on the international and not the local competence of the foreign court greatly simplifies the task of the English court when deciding whether recognition should be accorded to the pronouncement in question or not. The court can thus decide this question exclusively on the basis of the settled rules of the English conflict of laws to the entire exclusion of the often intricate law of procedure of the foreign court, with the interesting result that a foreign judgment may be more effective internationally than locally. Thus,

¹ On the distinction between international and local jurisdiction see p. 378, *ante*; and *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790 ff. *Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341, 368; *Turnbull v. Walker* (1892), 67 L.T. 767, 769; Dicey, 5th ed., Rule 91, pp. 391-2; Westlake, 7th ed., s. 319, p. 398; Foote, 5th ed., pp. 592, 597; 2 Beale, 1375-6.

if a judgment has been pronounced by a locally incompetent but internationally competent foreign court, the other local foreign courts may refuse to recognise the judgment whilst the English courts would have to accept it. The defence, that the foreign judgment has been given contrary to the rules of local procedure, is of no avail in the English court. The foreign judgment is capable of recognition in the English courts¹ as long as it has not been revoked or made inoperative in the foreign jurisdiction. Lindley, M.R.,² stated these rules as follows—

It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign court over persons within its jurisdiction, and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice . . .

The jurisdiction which alone is important in these matters is the competence of the court in an international sense : i.e., its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country.

(b) COMPETENCE AS REGARDS JUDGMENTS *IN PERSONAM* AND *IN REM*.

(i) JUDGMENTS *IN PERSONAM*.

(a) *IN GENERAL*. The cases where foreign courts are internationally competent to adjudicate upon actions *in personam* have been described by Buckley, L.J., in *Emanuel v. Symon*³ in the form of a catalogue which was mentioned earlier when the general principles of jurisdiction of the English and foreign courts were under examination.⁴ It is evident from that catalogue that the international jurisdiction of foreign courts in actions *in personam* strictly conforms with the twin principles of

(1) presence and

(2) submission

which are supplemented by

(3) the rule that the foreign courts are competent to give judgment against defendants who (without being present in or having submitted to the jurisdiction of the foreign courts) are, at the commencement of the suit, nationals of the foreign state whose courts are invoked.

¹ 2 Beale, 1375-6.

² *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790-1.

³ [1908] 1 K.B. 302, 309.

⁴ See p. 385, *ante*.

It should be noted that, in the eyes of the English conflict of laws, foreign courts are not internationally competent in other than these three cases. In particular, the situation of the property of the defendant in the foreign jurisdiction at the commencement of the suit, or the location of a permanent place of business of the defendant in that jurisdiction, or the fact that a contract was concluded or to be performed there, and other similar facts are according to English law not regarded as sufficient to confer international jurisdiction on the foreign courts, although according to the practice in those courts such facts may entitle the courts frequently to pronounce judgments against the defendant personally.

The three cases where foreign courts are deemed competent to entertain actions *in personam* have been considered exhaustively on an earlier occasion.¹ All that remains to be added is an examination of a special problem which arises not infrequently in connection with the submission of a party to the jurisdiction of a foreign court.

(β) *APPEARANCES WHICH DO NOT NECESSARILY AMOUNT TO SUBMISSION TO FOREIGN JURISDICTION.* It is beyond doubt that in certain suits ² a defendant, who enters a voluntary appearance in foreign proceedings and pleads to the matter, submits to the jurisdiction of the foreign court though, apart from that submission, the court may not be competent to entertain proceedings against him. In such a case, the defendant takes the chance of obtaining a favourable judgment in the foreign court and, if that court decides against him, he cannot be heard later to contend that the court had no jurisdiction to entertain the suit.

Sometimes, however, the fact that the defendant entered an appearance in the foreign courts does not permit the inference that he intended to submit to the foreign jurisdiction. He may enter an appearance only in order to protest against the jurisdiction of the foreign court. Or he may be compelled to enter an appearance in order to save his property situate in the foreign jurisdiction and in jeopardy of being sold by order of that court. In these cases the question arises whether, despite the fact that he entered an appearance, the defendant can be heard with the plea that in the particular circumstances of the case the appearance does not amount to a submission to the foreign jurisdiction. The English cases,³ which deal with these

¹ See pp. 381-387, *ante*.

² See pp. 382, 389, *ante*.

³ *Voinet v. Barrett* (1885), 55 L.J.Q.B. 39; *Guiard v. De Clermont*, [1914] 3 K.B. 145; *Harris v. Taylor*, [1915] 2 K.B. 580; *Tallack v. Tallack*, [1927] P. 211, 222.

problems at Common Law,¹ make it clear that what is really decisive in this connection is the intention of the defendant to submit to the foreign jurisdiction and not the fact that he entered an appearance; but that by entering an appearance he provides a strong *prima facie* indication of his intention to submit which can be rebutted only in exceptional circumstances. This statement will be elucidated by the following observations.

(AA) *Appearance under protest against foreign jurisdiction.* As regards an appearance under protest against the foreign jurisdiction,² it appears from the decision of the Court of Appeal in *Harris v. Taylor*³ that such an appearance implies normally the submission of the defendant to the jurisdiction of the foreign court and renders a judgment of that court recognisable in the English jurisdiction.

In that case the defendant who was resident in England was sued in the High Court of the Isle of Man for damages for criminal conversation with the plaintiff's wife. He entered a conditional appearance and moved the Manx Court to set aside the writ for want of jurisdiction. After his motion was dismissed, he took no further part in the proceedings and final judgment for £800 was entered against him in the Manx Court. Later the plaintiff resorted to the English courts and commenced an action on the Manx judgment against the defendant who contended that the Manx court had no jurisdiction over him.

The Court of Appeal unanimously rejected this defence and held that, by entering a conditional appearance in the Manx proceedings for the purposes of contesting the jurisdiction of that Court, the defendant had submitted to the Manx jurisdiction. Buckley, L.J., observed with respect to the defendant: "He was not subject to the jurisdiction of the Court, and if he had done nothing, although the Court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the Court. But the defendant was not content to do nothing: he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it."

This decision does not establish the principle that, in all circumstances, an appearance under protest is to be regarded as submission to the

¹ It is doubtful whether the provisions of s. 4 (2) (a) (i) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (23 Geo. 5 ch. 13) must be interpreted differently from the rules of Common Law, as is maintained by Professor Cheshire (3rd ed., p. 785).

² The conditional appearance is generally subject to the same considerations. [1915] 2 K.B. 580.

foreign jurisdiction, but is based on the precise facts of that particular case and merely shows in what circumstances the courts are likely to draw the inference that an appearance under protest amounts to a virtual submission. It can hardly be disputed that the surrounding circumstances were in that case not particularly favourable to the defendant. He had contested the local jurisdiction of the Manx Court though that jurisdiction was entirely irrelevant in subsequent proceedings against him in England and though he could not refer to any substantial disadvantage which he might have suffered if he had, in the words of the learned Lord Justice, been content to do nothing.

It follows from *Harris v. Taylor*¹ that normally a defendant who internationally is not subject to the foreign jurisdiction is well advised not to contest the local jurisdiction of a foreign court by entering an appearance under protest there but to confine himself to defending his case in the subsequent English proceedings. The rule in *Harris v. Taylor*,¹ if understood as suggested here, would not, however, prevent an English Court from holding that in different circumstances an appearance under protest does not amount to a voluntary submission to the foreign jurisdiction. If, e.g., the defendant were able to satisfy the English court that substantial disadvantage would have ensued if he had not protested in the foreign court, it may well be that the English court will consider the appearance as induced by motives other than the intention to take the chance of a favourable decision in the foreign court. This proposition is supported by the following *obiter dictum* of Lord Merrivale, P., in *Tallack v. Tallack*²—

I am not persuaded that an appearance to such a petition as the present, qualified at all stages of the case by a distinct and reasoned denial of the existence of jurisdiction, could with any propriety be regarded as a submission to the exercise of the jurisdiction so denied.

(BB) *Appearance to save property.* Similar rules apply if the defendant has entered an appearance in, and even if he has defended, an action in a foreign court for the purpose of saving his property situate in the foreign jurisdiction from a sale under an order of the court. In such cases the defendant would suffer a substantial disadvantage if he did not contest the claim abroad, and an appearance to such a suit is not of a voluntary character but an appearance under duress. In these cases the courts will scrutinise the intention of the defendant when entering the appearance in the light of all the surrounding cir-

¹ [1915] 2 K.B. 580.

² [1927] P. 211, 222.

cumstances. They are inclined to regard the appearance as involuntary if, at the time when it was made, the goods had already been seized. If, on the other hand, at the time of the appearance, the property of the defendant had not been seized and he only feared that it might be attached later or he desired to avoid inconvenience which might ensue if he transferred property into that jurisdiction later,¹ the courts would consider the appearance as an indication of the defendant's intention to submit voluntarily to the foreign jurisdiction. It should be noted, however, that these are not actual rules of law, but only illustrations of inferences drawn by the courts when examining these cases. It is, therefore, not surprising that Lawrence, J., in *Guiard v. De Clermont & Donner*,² where an appearance to save property already seized was in issue, considered the appearance, in the light of the particular circumstances of that case, as a voluntary one. The learned Judge said—

I have to ask myself whether the proposition that an appearance is not voluntary where it is merely to save goods which have been seized is a doctrine of law, or whether it is a fact from which you may infer the further fact that it was involuntary. If it is a proposition of law, and I ought to infer necessarily, from the mere fact that there was, for instance, 1 £ or 1 franc in the *Crédit Lyonnais*, that the appearance was involuntary, of course, the defendants are right. I do not, however, think that is what is meant. I think "involuntary" means what it says, that it is involuntary, and I do not think the defendant's appearance was involuntary in this case.

(ii) JUDGMENTS *IN REM*. A foreign court is internationally competent to pronounce a judgment *in rem*, if, in the words of Blackburn, J.,³ "the subject matter was so situated as to be within the lawful control of the state under the authority of which the Court sits." This principle applies equally to judgments *in rem* concerning immovable, movable and intangible property.⁴

Judgments adjudicating on the status of a person, e.g., divorce decrees, are treated similarly to judgments *in rem*, but the jurisdiction of foreign courts in these cases is governed by special rules which have been considered above.⁵

Sometimes it is doubtful whether a foreign judgment should be

¹ *Voinet v. Barrett* (1885), 55 L.J. Q.B. 39; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; *Guiard v. De Clermont* [1914.] 3 K.B. 145.

² [1914] 3 K.B. 145, 155.

³ In *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 429, 448.

⁴ Story, s. 591, 592, quoted with approval in *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 428; see p. 380, *ante*.

⁵ See p. 311, *ante*.

treated as a judgment *in personam* or a judgment *in rem*. This is a question of characterisation in the sense in which that term has been used earlier, and has to be determined on the basis of the *lex fori* of the foreign judgment. If, therefore, both the procedure in the foreign court and the judgment itself make it clear that the foreign court assumed to act *in rem*, the judgment will be accepted in the English jurisdiction as a judgment *in rem* though the English courts would, in similar circumstances, have only been entitled to pronounce a judgment *in personam*.¹

C. Finality of the foreign judgment. The third requirement for the recognition of a foreign judgment in the English jurisdiction is that the judgment must be final. There are two elements necessary to establish the finality of a judgment, viz., (i) the judgment must be unalterable, i.e., it must be *res judicata* in the court where it has been pronounced; and (ii) if *in personam*, it must be for a sum certain in money.

(a) THE JUDGMENT MUST BE *RES JUDICATA* IN THE FOREIGN COURT. The finality of the foreign judgment in the court in which it was pronounced has been thus explained by Lord Herschell in *In re Henderson; Nouvion v. Freeman* ²—

I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties.

The reason for this rule is that it would hardly be possible for the English courts to give a conclusive judgment upon a foreign provisional judgment, without interfering with the discretion of the foreign court, or, at least, embarrassing that court.

The test of finality, in this sense, is only satisfied if the judgment of the foreign court, as far as that particular court is concerned, settles the dispute conclusively and definitely. Whether the foreign judgment is the result of an adjudication upon the matter in dispute, or whether it is a judgment in default of appearance or defence is irrelevant, for the decisive point is that the matter is *res judicata* in the

¹ *Castrique v. Imrie* (1869), L.R. 4 H.L. 414; *Minna Craig Steamship Company v. Chartered Mercantile Bank of India, London and China*, [1897] 1 Q.B. 460; see also *In re Macartney*; *Macfarlane v. Macartney*, [1921] 1 Ch. 522, 526.

² (1889), 15 App. Cas. 1, 9; *Harrop v. Harrop*, [1920] 3 K.B. 386, 398; *Beatty v. Beatty*, [1924] 1 K.B. 807, 815.

foreign court, and not that the facts and rights of the parties have been investigated.¹

The test of finality is, on the other hand, not satisfied by interlocutory or otherwise provisional decisions of the foreign court, or by decisions (e.g., as to the payment of alimony²) which can subsequently be varied by the court at its discretion. These rules are illustrated by the decision of the House of Lords in *In re Henderson : Nouvion v. Freeman*, a case concerned with the finality of a *remate* judgment in Spain.

A debtor had been sued in Spain in an "executive" action which is instituted by way of summary proceedings and is concluded by a *remate* judgment. In these proceedings only a limited number of defences is available to the debtor. Both the creditor and debtor are at any time entitled to abandon the summary proceedings and institute, in the same Spanish Court, "ordinary" proceedings, which permit of the consideration of all the defences of the debtor, and result in a plenary or declaratory judgment. Even after the *remate* judgment has been given, it is open to the unsuccessful party to apply to the same court which pronounced the *remate* judgment for a review of the case in "ordinary" proceedings, and in such proceedings the fact that a *remate* judgment had been given is entirely disregarded.

The House of Lords held unanimously that the *remate* judgment against the debtor does not satisfy the test of finality and is, therefore, not entitled to recognition in the English courts.

It should, however, be observed that a foreign judgment does not lose its final character merely by reason of the fact that a court other than the one which pronounced the judgment is entitled to review it. Consequently, foreign judgments remain recognisable although an appeal against them is admitted by the foreign procedure or is even pending.³ The English court will, however, in appropriate cases stay an action on the foreign judgment until it is clear that no appeal will be brought in the foreign jurisdiction, or, if an appeal is pending there, until it is disposed of by the superior courts of the foreign country.⁴

(b) THE JUDGMENT MUST BE FOR A SUM CERTAIN IN MONEY. The test of finality implies, further, that the foreign judgment, if *in personam*, must be for a sum certain in money.⁵ This condition is

¹ Lindley, L.J., in *In re Henderson, Nouvion v. Freeman* (1887), 37 Ch.D. 244, 255, 256.

² See p. 429, *post*.

³ See *per* Scrutton, L.J., in *Beatty v. Beatty*, [1924] 1 K.B. 807, 815.

⁴ *Scott v. Pilkington* (1862), 2 B. & S. 11, 14; *In re Henderson : Nouvion v. Freeman* (1889), 15 App. Cas. 13; *Jeannot v. Fuerst* (1909), 25 T.L.R. 424, 425.

⁵ *Continental Lines Société Anonyme v. W. H. Holt & Sons (Chorlton-cum-Hardy) Ltd.* (1932), 43 Ll.L.R. 392; *Sadler v. Robins* (1808), 1 Camp 253; *Beatty v. Beatty*, [1924] 1 K.B. 807; *Henderson v. Henderson* (1844), 6 Q.B. 296.

not satisfied if the judgment merely orders the payment of money without fixing definitely the sum payable by the defendant, because otherwise "no one can predicate how much the defendant is decreed to pay."¹ If, however, the obligation of the defendant is ascertainable on the basis of the judgment by the application of a simple arithmetical process, the maximum "*id certum est quod certum reddi potest*"² applies, and the requirement of finality is satisfied. Thus, if a foreign judgment orders the defendant to pay a fixed sum of money every week for an unspecified period, the judgment is sufficiently definite to be admitted to recognition in the English courts though it would be necessary for them to ascertain from extraneous facts the number of weeks in respect of which the defendant was in default.³ It is, further, not necessary that the foreign judgment should give rise to a debt in the technical sense. Any kind of obligation which is definitely fixed in money by the foreign judgment would make that judgment recognisable in the English jurisdiction. Thus, in a case where the foreign judgment ordered the defendant to indemnify the plaintiff in a sum certain in money, Branson, J.,⁴ regarded the judgment as capable of recognition in the English jurisdiction.

(c) CASES CONCERNING PAYMENT OF ALIMONY. The practical application of the rules concerning the requirement of finality is illustrated by the cases where a foreign court orders the defendant to pay alimony to the plaintiff.⁵ Judgments or orders for alimony are generally of a particular character, e.g., they fix the alimony on a weekly or monthly basis without definitely limiting the obligation of the defendant in time, and they can usually be altered at the discretion of the court that has ordered the payment. The first characteristic does not affect the recognition of the foreign judgment, for, as explained above, it is sufficient that the sum of money ordered to be paid by that judgment is ascertainable. The second characteristic, however, offers a real obstacle, for no foreign judgment is admitted to recognition that can be altered by the court that pronounced it. Here, an important distinction should be noted. In some countries, like England,⁶ the Court has liberty to alter not only the future instal-

¹ Per Lord Ellenborough in *Sadler v. Robins* (1808), 1 Camp 253, 257.

² *Beatty v. Beatty*, [1924] 1 K.B. 807, 816, 818.

³ *Continental Lines Société Anonyme v. W. H. Holt & Sons (Chorlton-cum-Hardy) Ltd.* (1932), 43 Ll.L.R. 392, 396; *Aboulloff v. Oppenheimer* (1882), 10 Q.B.D. 295, 304.

⁴ *Harrop v. Harrop*, [1920] 3 K.B. 386; *In re Macartney; Macfarlane v. Macartney*, [1921] 1 Ch. 522; *Beatty v. Beatty*, [1924] 1 K.B. 807.

⁵ See *Bailey v. Bailey* (1884), 13 Q.B.D. 855, 857; *Robins v. Robins*, [1907] 2 K.B. 13.

ments of alimony but also past instalments which have already accrued due. A foreign judgment of such a character is, with respect to both past and future instalments, not recognised in the English courts. In other countries, as e.g., the State of New York and Germany, the courts are not permitted to alter past instalments, but they may alter the judgment with respect to future instalments. A foreign judgment coming within this category is final with respect to the arrears and is to that extent recognised by the English courts, but such a judgment does not satisfy the English test of finality with respect to the future instalments.¹

2. EFFECT OF RECOGNITION.

A. Conclusiveness of the foreign judgment. A foreign judgment that satisfies the four requirements of recognition² is regarded in the English jurisdiction as a conclusive adjudication upon the points of fact and law decided by the foreign judgment. The English courts refuse to admit a re-trial of the issues which have already been finally settled by a competent foreign tribunal. The conclusive effect of the foreign judgment is, in principle, the same, whether the judgment is relied upon by a plaintiff in English proceedings as a cause of action, or whether it is pleaded by a defendant in English proceedings in bar to an action instituted against him.³

This effect of conclusiveness is the logical consequence of the view that a foreign judgment imposes on the party against whom it was given an obligation to obey and confers on the party in whose favour it was given a corresponding right to claim that obedience.

(a) THE FOREIGN JUDGMENT CANNOT BE IMPEACHED ON ITS MERITS. The conclusive effect of the foreign judgment is best demonstrated by the rule that the judgment cannot be impeached on its merits in the English proceedings.⁴ The English courts are prepared to examine the formal requirements of recognition, including the competence of the foreign court, but, having found those requirements to be in order, the English courts will not inquire whether the decision of the foreign court is correct in fact or in law. This aspect of conclusiveness was first stated by Lord Campbell, C.J., in *Bank of Australasia v. Nias*⁵—

¹ *Beatty v. Beatty*, [1924] 1 K.B. 807.

² See p. 419, *ante*.

³ Dicey, 5th ed., p. 400; *dissentiente* Piggott, 3rd ed., Part I, p. 44.

⁴ *Bank of Australasia v. Nias* (1851), 16 Q.B. 717; *Castrique v. Imrie* (1870), L.R. 4 H.L. 414; *Godard v. Gray* (1870), L.R. 6 Q.B. 139; *Messina v. Petrocochino* (1872), L.R. 4 P.C. 144; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Richard v. Garcias* (1845), Cl. & F. 368; *Henderson v. Henderson* (1844), 6 Q.B. 288; *Ellis v. McHenry* (1871), L.R. 6 C.P. 228.

⁵ (1851), 16 Q.B. 717, 735.

It does not appear, however, that the question has ever been solemnly decided, whether, in an action on a foreign judgment, the merits of the case upon which the foreign Court has regularly adjudicated between the parties may again be put in issue and retried. It seems contrary to principle and expediency for the same questions to be again submitted to a jury in this country.

How strictly the English courts adhere to this principle can be seen from the fact that they will refuse a re-trial even if the error in the foreign judgment appears on the face of the judgment. They assume that this error would not have occurred if the parties had presented their case properly and they regard any such error as subject to correction on appeal to the superior courts in the foreign country concerned. They do not consider it their task to exercise appellate jurisdiction over foreign courts. Moreover, the English courts refuse to disregard the foreign judgment even if the foreign judgment is based upon an evident misapprehension of English law which the foreign court sought to apply as the law governing the issue.¹ This is, as pointed out by Blackburn, J., in *Godard v. Gray*,² an inevitable conclusion from the fundamental theory that recognition is, in fact, accorded to the private right created by the foreign judgment, a right which is none the less existent in spite of the error that occurred when it was created. In *Godard v. Gray* ²—

an action was brought in England on a French judgment ordering the defendants to pay a certain sum of money. The defence was that the French judgment was erroneous and ought to have been pronounced in favour of the defendants.

The French judgment had awarded damages against the defendant for breach of an English charter-party which contained a clause that the penalty for the breach was the estimated amount of freight. According to English law this clause does not absolutely limit the damages, but a party is entitled to claim damages in excess, if the claim can be founded on grounds other than the penal clause. The French court, however, which intended to interpret the charter-party according to English law, erroneously came to the conclusion that the penal clause conclusively limited the damages, and assessed the damages on that basis. The contention of the defence, that the French judgment showed, on the face of it, an erroneous interpretation of English law, was therefore admittedly correct.

The Court rejected the defence and gave judgment for the plaintiff.

Blackburn, J., said in a judgment with which Mellor, J., concurred ³ : " We enforce a legal obligation, and we admit any defence which shews that there is no legal obligation or a legal excuse for not fulfilling it ; but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the Court much trouble

¹ *Imrie v. Castrique* (1860), 8 C.B. 405; *Castrique v. Imrie* (1870), L.R.

4 H.L. 414; *Godard v. Gray* (1870), L.R. 6 Q.B. 139.

² (1870), L.R. 4 Q.B. 139.

³ At p. 152.

to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers that he can show did exist?"

(b) THE EXTENT OF CONCLUSIVENESS. The conclusive nature of a foreign judgment extends to the points of fact and law which form directly and immediately the subject matter of the decision,¹ but not to other questions, and particularly not to points of a collateral and incidental character. Blackburn, J., observed ² that—

a judgment in an English Court is not conclusive as to anything but the point decided.

If, therefore, the issues in the foreign and English proceedings are not identical, the rule as to the conclusive effect of the foreign judgment does not apply. Thus, in a case where the surrounding facts gave rise to an action for breach of contract and for negligence, but the foreign judgment decided the former cause of action only, the foreign judgment could not be pleaded in bar of a subsequent action in tort instituted in the English jurisdiction.³ It is interesting to note that the conclusive effect of a foreign judgment may be more limited than the effect of an estoppel by record, which an English judgment produces,⁴ and which a foreign judgment (which is not a matter of record) is unable to produce.⁵

The foreign judgment operates, on the other hand, as *res judicata* with respect to any point which concerns the subject matter of the foreign suit, and which should have been raised in the foreign court, but was, in fact, not pleaded. "When a party having a defence omits to avail himself of it . . . he is not allowed afterwards to set up such matter of defence as an answer to the judgment, which is considered final and conclusive."⁶ This extension of the conclusive effect of a foreign adjudication is due to the desire to avoid multiplicity of actions and to protect the defendant from vexatious litigation.

The extent of conclusiveness is the same for judgments *in rem* and *in personam*—

¹ Professor H. C. Gutteridge in 13 *B.Y.B.I.L.* (1923), 63.

² *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 434.

³ *Callander v. Dittrich* (1842), 4 M. & G. 68, 89.

⁴ *Duchess of Kingston's Case* (1776), 2 Sm. L.C. 754; *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155.

⁵ Gutteridge, *ibid.*, pp. 62-4; but it seems that a foreign judgment can produce an estoppel *in pais*: *Abouloff v. Oppenheimer* (1872), 10 Q.B.D. 295, 307; *Continental Lines Société Anonyme v. W. H. Holt & Sons* (1932), 43 Ll.L.R. 392.

⁶ *Per Bovill, C.J.*, in *Ellis v. McHenry* (1871), L.R. 6 C.P. 228, 238-9.

excepting that in the one "the point" adjudicated upon (which in a judgment *in rem* is always as to the status of the *res*) is conclusive against all the world as to that status, whereas in the other "the point," whatever it may be, which is adjudicated upon . . . is only conclusive between parties and privies.¹

B. Exceptions. The rule, that the English courts will accept the final judgment of a competent foreign court as conclusive with respect to the points of fact and law decided by the foreign court, is subject to two exceptions which are justified by overriding considerations of English public policy in the wider sense.² The English courts will not accord conclusiveness to a foreign judgment which is alleged—

(a) to have been obtained by fraud, or

(b) to infringe English public policy.

In these two instances the English courts will re-open the case and investigate the subject matter so far as is necessary for the determination of the respective allegations.

(a) **IN CASE OF FRAUD.** It is a good defence against a foreign judgment, for which recognition is sought in the English courts, that it has been obtained by fraud. This exception has been stated by Brett, L.J.,³ in the following terms—

The obligation, that is asserted in the English action against the defendant, is an obligation imposed on him by the judgment of the foreign court. . . . No obligation can be enforced in an English Court of justice which has been procured by the fraud of the person relying upon it as an obligation.

The foreign judgment is not, however, deprived of its conclusive effect by every instance of fraud. Generally a judgment is unimpeachable on the merits, and this rule prevails even where an allegation of fraud has been submitted to the foreign court and erroneously dismissed by the foreign court. But the position is entirely different if the foreign judgment has been *obtained* by fraud, i.e., if it is the result of a deception practised on the court by a party to the proceedings. This difference has its origin in the distinction between intrinsic and extrinsic fraud which was developed in English municipal law in cases dealing with the question whether an English judgment can be impeached for fraud. De Grey, C.J., said, in *The Duchess of Kingston's Case* ⁴ with respect to a judgment of an English ecclesiastical court, "that it is impeachable from without; although

¹ *Per* A. L. Smith, L.J., in *Ballantyne v. Mackinnon*, [1896] 2 Q.B. 455, 462.

² See p. 62, *ante*.

³ *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 205, 305-6.

⁴ (1776), 2 Sm. L.C. 8th ed., 784.

it is not permitted to shew that the Court was mistaken, it may be shewn that they were misled." It would, however, be too narrow to state the modern English doctrine regarding the defence of fraud against foreign judgments in the precise terms used by the learned Chief Justice in 1776 and to maintain that a foreign judgment can be re-examined in the English courts only if it is shown that the alleged fraud constitutes an act of extrinsic fraud (e.g., the substitution of a forged for a true document) practised on the court, whereas intrinsic fraud (e.g., the perjury of a witness) would not be sufficient.¹

The modern English cases² make it clear that the decisive test is whether the miscarriage of justice that took place in the foreign court was due to the fraudulent machinations of the party who attempts to rely on the foreign judgment in the English jurisdiction, or whether it was due to other causes.³ If it can be shewn or at least seriously alleged that the foreign court erred in consequence of the fraudulent machinations of that party, the English courts will re-open the case whether the alleged fraud was extrinsic or intrinsic and despite the fact that it has or could have been pleaded in the foreign court. Technically, the English courts, when considering whether the foreign judgment has been obtained by fraud, do not act against the principle that a foreign judgment cannot be impeached on its merits. The issue in the foreign courts may be whether a particular act was fraudulent or whether a particular witness should be believed, but in the English courts the issue would be whether the foreign judgment was *obtained* by fraud, an issue that "never could have been submitted to them (i.e., the foreign courts), never could have been in issue before them, and, therefore, never could have been decided by them."⁴ "The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this Court you have to consider whether the foreign Court has been imposed upon."⁵

This, however, is only the technical aspect of the problem. It

¹ The test of extrinsic fraud is still applied in American Law; 2 Beale, 1403.

² *Vadala v. Lawes* (1890), 25 Q.B.D. 310; *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 205; *Jacobson v. Frachon* (1928), 138 L.T.R. 386; *Ochsenbein v. Papelier* (1873), 8 Ch. App. 695; *Ellerman Lines Ltd. v. Read*, [1928] 2 K.B. 144.

³ It is sometimes said that the fraud, by which the foreign judgment has been obtained, must either be the fraud of the party in whose favour the judgment has been given or the fraud of the foreign court itself (Dicey, 5th ed., rule 105; Cheshire, 3rd ed., p. 812). However, if the foreign court acted fraudulently, it was not impartial, and the decision has not been given under observance of the judicial process; see at pp. 419-20, *ante*.

⁴ *Per* Lindley, L.J., in *Vadala v. Lawes* (1890), 25 Q.B.D. 310, 318.

⁵ *Ibid.*, *per* Lindley, L.J., 317.

cannot be denied that, in those cases where the foreign court has or could have decided upon the facts on which the assertion of fraud is based, the investigation by the English courts amounts actually to an examination of the merits of the foreign judgment. In so far, the defence in the English proceedings, that the party relying on the foreign judgment has procured it by fraud, represents a true exception to the principle that a foreign judgment satisfying the requirements of recognition is accepted as conclusive in the English courts. This exception is based "on the broad ground that no man can take advantage of his own wrong, and that it is a principle of law, that no action can be maintained on the judgment of a court either in this country or in any other which has been obtained by the fraud of the person seeking to enforce it."¹

The principle upon which the defence of fraud has been admitted against a foreign judgment is clearly perceptible in those instances where the fraud consisted in an alleged perjury of a witness in the foreign court. Generally, the perjury of a witness does not justify the re-opening of the matter decided in the foreign court, since the party claiming recognition of the foreign judgment may not necessarily be implicated in the fraud of the witness.² If it is, on the other hand, alleged that that party has suborned the perjured witness, or if that party has himself given perjured evidence in the foreign court,³ the plea of fraud is material and the English courts will re-examine the facts although the foreign court might have dismissed the allegation of perjury. *Atkin, L.J.*,⁴ expressed this distinction in the following terms—

It appears to me that to show that one of the witnesses was a biased witness, or was interested in the case, is only an attack on the merits of the decision and is not an attack upon the procedure. It would be different to my mind, if it could be shown that the plaintiff had himself procured a witness whom he knew to be a biased witness, and who would be likely to mislead the court. That, to my mind, would be fraud on the part of the plaintiff.

Examples where the English courts have entertained the defence of fraud against a foreign judgment are: where the plaintiff had fraudulently represented to the foreign court that certain goods forming the subject matter of the foreign suit were not in her possession whilst the

¹ *Per Lord Coleridge, C.J., in Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 295, 303.

² *Jacobson v. Frachon* (1928), 138 L.T.R. 386, 394.

³ *Ellerman Lines Ltd. v. Read*, [1928] 2 K.B. 144.

⁴ *In Jacobson v. Frachon* (1928), 138 L.T.R. 386, 394.

contrary was 'true';¹ where the plaintiff fraudulently induced the foreign court to believe that certain bills of exchange were commercial bills and not given for gambling transactions;² and where the plaintiff through the agency of his son had promised the defendant not to proceed with the foreign proceedings and burnt the writ in his presence, but had then, behind the defendant's back, proceeded with the foreign action and signed default judgment against him.³

The defence of fraud is, in principle, admitted, against foreign judgments alike *in personam* and *in rem*.⁴ In view, however, of the absolute effect produced by the latter class of judgment, it should again be emphasised that the defence of fraud is only available against the party (or his privies) who has by deception procured the judgment in his favour in the foreign court. In consequence, the defence of fraud can be pleaded⁵ only if the litigants in the foreign proceedings *in rem* and the subsequent English proceedings are the same, and not, e.g., against a person who has *bona fide* purchased the *res* under an order of sale of the foreign court. If *A* obtains by fraud a judgment against *B*'s ship in a foreign court, and the ship is sold by order of the Court to the *bona fide* purchaser *C*, it would appear that the foreign judgment can be reviewed in proceedings between *B* and *A*, but not in proceedings between *B* and *C*.⁶ That the absolute effect which judgments *in rem* produce might lead to a restricted availability of the defence of fraud, is further evidenced by foreign decrees of divorce obtained by collusion of the parties. If the parties by their collusive action induced the foreign court to believe that it had *jurisdiction* to pronounce a decree whereas, as a matter of fact, it was incompetent to entertain the petition, the fraud vitiates the foreign proceedings, and the foreign decree is regarded as invalid in the English jurisdiction.⁷ If, on the other hand, the collusion of the parties concerned a point other than jurisdiction, if, e.g., they misrepresented to a foreign court of competent jurisdiction that a ground for the divorce existed, the foreign decree would be regarded as conclusive in the English juris-

¹ *Abouloff v. Oppenheimer & Co.* (1882), 10 Q.B.D. 295.

² *Vadala v. Lawes* (1890), 25 Q.B.D. 310.

³ *Ochsenbein v. Papelier* (1873), Ch. App. 695.

⁴ As regards judgments *in rem*, see *The Alfred Nobel*, [1918] P. 293 (a Prize Case).

⁵ Dicey, 5th ed., Comment to rule 105, p. 450.

⁶ See the observations of Blackburn, J., in *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 433. Compare also *Castrique v. Behrens* (1861), 30 L.J. Q.B. 163, 158.

⁷ *Shaw v. Gould* (1868), L.R. 3 H.L. 55; *Bonaparte v. Bonaparte*, [1892] P. 402; see p. 315, *ante*.

diction and the defence of fraud would fail.¹ This rule was thus stated by Sir J. Gorell Barnes, P. ²—

But I think when those cases are examined that the collusion or fraud which was being referred to was in every case, so far as I have had time to examine the matter, collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the Court. In other words, as an illustration, cases where the parties have gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there, and had so induced the court to grant a decree. The collusion or fraud in those cases goes to the root of the jurisdiction. . . . But supposing that what was kept back was something that would have made the Court come to a different conclusion than it would otherwise have done, I can see no valid reason in the judgments in cases affecting status for treating the decree as a nullity, unless it is set aside.³

(b) IN CASE OF VIOLATION OF THE PUBLIC POLICY OF THE ENGLISH *LEX FORI*. Further, English courts refuse recognition to a foreign judgment that is based upon a cause of action which is contrary to English public policy. It has been explained earlier ⁴ that the English courts do not recognise foreign vested rights which contravene English public policy or are otherwise incompatible with English social institutions. Although the obligation arising from a foreign judgment is not identical with the original cause of action, the illegality of the latter vitiates the new obligation in the same way as, e.g., in the law of contract a money bond is invalid, if substituted for an original obligation which was illegal.⁵ In other words, a foreign judgment cannot be used as a means to enforce in the English jurisdiction a claim which, if based on its original cause of action, would have infringed English general policy. Thus, a foreign judgment enforcing, in fact, a foreign penal or revenue law would not be recognised in the English jurisdiction, since the claim, if based upon the original cause of action, would have been against English public policy.⁶ Similarly a Maltese judgment ordering a person who was alleged to be the father of an illegitimate child, to pay a perpetual alimony to that child was refused recognition in the English courts because the recognition of the permanent rights of illegitimate children and their mothers is "contrary to the established policy of this country, especially having regard to the fact that the child's interest is not confined to minority." ⁷

¹ *Bater v. Bater*, [1906] P. 209.

² In *Bater v. Bater*, [1906] P. 209, 218.

³ I.e., set aside by the foreign court pronouncing it.

⁴ See pp. 50, 62, *ante*. ⁵ *Fisher v. Bridges* (1854), 3 E. & B. 640, 649.

⁶ *Huntington v. Attrill*, [1893] A.C. 155.

⁷ In *re Macartney*; *Macfarlane v. Macartney*, [1921] 1 Ch. 522, 528.

III. DIRECT ENFORCEMENT OF FOREIGN JUDGMENTS

It has been seen that at Common Law the only method of giving affirmative effect to a foreign judgment in the English jurisdiction is to institute an English action upon the foreign judgment in order to obtain a "judgment upon a judgment." This procedure is in practice not as cumbrous as it would appear to be, since, owing to the conclusive effect normally produced by a foreign judgment, a limited number of defences only is admitted. Professor Gutteridge¹ observes rightly that—

in the great majority of cases the result is that the foreign judgment creditor obtains an English judgment within a very brief space of time and at a very small cost.

Moreover, it is even possible to institute summary proceedings under Order 14 in order to obtain a judgment upon a judgment, and this method is, as Master Valentine Ball² confirms, frequently employed in practice.

In some instances, however, Parliament has provided a simplified process for giving effect to a foreign judgment. In three enactments the direct enforcement of foreign judgments, without the intervention of an English adjudication, has been admitted. The common feature of these enactments, which will be reviewed later, is that the facilities offered by them for the enforcement of foreign judgments depend on the accord by the foreign jurisdiction of reciprocal treatment to English judgments—a requirement that shows clearly the difference in the attitude of the legislature from that of the judiciary with regard to the recognition of foreign judgments.

1. JUDGMENTS EXTENSION ACT, 1868.

The principle of the direct enforcement of foreign judgments was first introduced by the Judgments Extension Act, 1868,³ which deals with the reciprocal enforcement within the United Kingdom of certain judgments of the superior courts of England, Scotland and Northern Ireland.⁴ The Act requires consideration here only in so far as it

¹ Professor H. C. Gutteridge, "Reciprocity in regard to foreign judgments," (13) *B.Y.B.I.L.* (1932), 49, 54.

² Sir William V. Ball, "The Enforcement of Foreign Judgments," 1928. (Reprinted from *The Solicitors' Journal*).

³ Cf. Dicey, 5th ed., Rule 116; *Annual Practice*, notes to Order 42, rule 28.

⁴ Similar provision is made under the Inferior Courts Judgments Extension Act, 1882, for the reciprocal enforcement of certain decisions of inferior courts in England, Scotland and Northern Ireland. The observations in the context refer only to the provisions of the Act of 1868.

admits the extension of Scottish and Northern Irish¹ judgments in the English jurisdiction. Under the Act judgments for debt, damages or costs obtained in the Court of Session in Scotland or in the High Court of Northern Ireland can be registered in the High Court of England and thereupon produce, for the purposes of execution, the same effect as an English judgment.

The Act of 1868 is applicable only to judgments ordering the payment of money; injunctions, prohibitions or other decrees ordering equitable relief and decrees in matrimonial causes are not capable of registration.² Furthermore, Scottish default judgments are not extensible if the jurisdiction of the Scottish court was founded solely on an arrestment of property of the defendant in the territorial jurisdiction of that court.³

A plaintiff, who has obtained in Scotland or Northern Ireland a judgment which can be extended under the Act, has the option of registering the judgment or suing on it at Common Law. If he elects the latter course, he is not entitled to recover costs in the English proceedings (unless the Court orders otherwise).⁴

The plaintiff who desires the registration of a Scottish or Northern Irish judgment must first procure a certificate of that judgment which is, then, entered in the register kept by the English Court. If the judgment satisfies the requirements of the Act, the English Court will register it as a matter of course, but, if the judgment is more than twelve months old, leave of the Judge is necessary before the judgment can be registered. Save in exceptional cases, a plaintiff resident in Northern Ireland or Scotland need not find security for costs when proceeding on a certificate of registration.⁵

The effect of an extended judgment is not the same as that of a judgment obtained in an English court. The Act limits the effect of the extended judgment strictly to matters relating to the execution of that judgment.⁶ A holder of an extended judgment may consequently obtain the ordinary writs of execution (e.g., the writ of *fi. fa.* or the writ of *elegit*), and would further appear to be entitled to equitable execution by way of receivership or garnishee proceedings as regards the extended judgment,⁷ but it would not be permissible

¹ The Act no longer extends to Eire; *Wakely v. Triumph Cycle Co.*, [1924] 1 K.B. 214, and has never applied to the Isle of Man and the Channel Islands.

² See the Scottish case of *Wotherspoon v. Conolly* (1871), 9 Macph. (Ct. of Sess.), 510, 513.

³ S. 8.

⁴ S. 6.

⁵ S. 5.

⁶ S. 4.

⁷ *Re a Judgment Debtor* (No. 2176 of 1938) (1939), 160 L.T.R. 92; *Johnstone v. Bucknall*, [1898] 2 I.R. 499.

to institute bankruptcy proceedings on the ground that an extended judgment has not been satisfied.¹

2. ADMINISTRATION OF JUSTICE ACT, 1920.

The principle of the direct enforcement of foreign judgments was extended by the Administration of Justice Act, 1920,² to the entire British Empire. The Act provides that His Majesty, if satisfied that reciprocity has been accorded to the judgments of the superior courts in the United Kingdom³ by the legislature of any other part of His Majesty's dominions, may by Order in Council declare that the Act, in so far as it deals with the reciprocal enforcement of judgments, shall extend to that part of His Majesty's dominions.⁴ Similar provisions are made for the application and extension of the Act to British protectorates and mandated territories.⁵ The Act has been extended, by Order in Council, to a great number of British dominions overseas, including the Dominions of New Zealand and Newfoundland, several States of Australia, the Province of Saskatchewan, Gibraltar, Malta, Rhodesia and Palestine.⁶ No further extension of the Act of 1920 is possible after the 10th November, 1933, owing to the operation of the Foreign Judgments (Reciprocal Enforcement) Act, 1933,⁷ which, by Order in Council⁸ was declared applicable to British dominions overseas, protectorates and mandated territories.

The Act of 1920, like the Judgments Extension Act, 1868, allows the plaintiff an option between registration proceedings and an action upon the foreign judgment, but mulcts the plaintiff in costs when pursuing the alternative offered by common law unless an application to register the judgment has been previously refused or the court otherwise orders.⁹ The Act applies only to judgments for the payment of money obtained in a superior court of the respective part of His Majesty's dominions,¹⁰ and provides¹¹ that no judgment shall be registered if—

¹ *In re A Bankruptcy Notice* (1898), 1 Q.B. 383; see further *In re Watson*, [1893] 1 Q.B. 21.

² Ss. 9-14.

³ The High Court in England, the Court of Session in Scotland, the High Court of Northern Ireland.

⁴ S. 14.

⁵ S. 13.

⁶ A complete list is contained in the *Annual Practice*, Order 41, rule 1 (n.); and in the *Index to the Statutory Rules and Orders in Force*.

⁷ S. 7, see p. 442, *post*.

⁸ By The Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933, S.R. & O., 1933, No. 1073.

⁹ S. 9 (5).

¹⁰ S. 12 (1), s. 9 (1). And further to awards in arbitration proceedings which are enforceable in that dominion (s. 12 (1)).

¹¹ S. 9 (2).

- (a) the original court acted without jurisdiction; *or*
- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; *or*
- (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was carrying on business within the jurisdiction of that court, or agreed to submit to the jurisdiction of that court; *or*
- (d) the judgment was obtained by fraud; *or*
- (e) the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; *or*
- (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

An application for registration under the Act of 1920 must be made in the manner provided by O.41 A of the Rules of the Supreme Court, 1883. The effect of registration under the Act is that the extended judgment has the same force and effect as a judgment obtained in the registering court, and that the registering court has the same control over the extended judgment as over its own judgments, but like the Judgments Extension Act, 1868, so far only as relates to execution.¹

In one feature the Act of 1920 is essentially different from the Judgments Extension Act, 1868. Unlike the latter Act, the Act of 1920 does not entitle the judgment creditor to claim registration as a matter of right, but leaves it to the discretion of the court to permit registration, if it thinks that the enforcement of the judgment in the United Kingdom is just and convenient.² The enforcement of a foreign judgment under the Act of 1920 and the subsequent Foreign Judgments (Reciprocal Enforcement) Act, 1933, is, in the words of Denning, J.,³

a process which involves a judicial officer being put in motion and which may be the subject of dispute and even in some cases of trial between the parties.

3. FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933.

The Foreign Judgments (Reciprocal Enforcement) Act, 1933, carries

¹ S. 9 (3); see p. 439, *ante*.

² S. 9 (1).

³ In *Kohn v. Rinson & Stafford (Brook), Ltd.*, [1948] 1 K.B. 327, where it was held that a plaintiff residing in a country to which the Act of 1920 applied, has, as a rule, to give security for costs whereas a plaintiff residing in Scotland or Northern Ireland need not normally do so (*Raeburn v. Andrews*, (1874), L.R.9 Q.B. 118).

the principle of the direct enforcement of foreign judgments further by admitting to registration in England judgments pronounced in the courts of foreign sovereigns. The Act, which is the most elaborate pre-War enactment relating to the conflict of laws, may prove of great value in the future.

The Act applies alike to foreign countries and British dominions¹ outside the United Kingdom, and enables the principle of registration by Order in Council to be extended to any foreign country or British dominion outside the United Kingdom which has granted substantial reciprocity to the United Kingdom as regards the enforcement of judgments. As to British dominions overseas it should be noted that a general Order was made on 10th November, 1933,² making the Act *applicable* to British dominions, but this Order does not enable successful litigants to register dominion judgments under the Act. Before such judgments can be so registered a further Order in Council must be made *extending* the benefit of registration to the dominion in question;³ such an Order, as in the case of countries under foreign sovereigns, presupposes that reciprocity has been granted to the judgments given in the superior courts of the United Kingdom.

The Act of 1933 has so far been extended to France⁴ and Belgium,⁵ and to India and Pakistan.⁶

The Act provides two stages for registration proceedings. It admits, upon relatively simple conditions, the registration of the judgments of superior courts sitting in the countries to which the Act has been extended and it then provides machinery for setting aside the registration on certain specific grounds. By this arrangement foreign judgments satisfying the requirements of the Act are made *prima facie* enforceable in the English jurisdiction, and the burden of showing why the presumption in favour of enforceability should not apply is placed upon the party opposing enforcement.

As regards the first of these stages, the superior courts of a country to which the Act is extended are specified by Order in Council, e.g., in the case of France, the courts are—

¹ Including protectorates and mandated territories: S. 7 (3).

² The Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933 (S.R. & O., 1933, No. 1073).

³ *Yukon Consolidated Gold Corporation Ltd. v. Clark*, [1938] 2 K.B. 241.

⁴ The Reciprocal Enforcement of Foreign Judgments (France) Order in Council, 1936 (S.R. & O., 1936, No. 609).

⁵ The Reciprocal Enforcement of Foreign Judgments (Belgium) Order in Council, 1936 (S.R. & O., 1936, No. 1169).

⁶ The Reciprocal Enforcement of Judgments (British India and Burma) Order 1938 (S.R. & O., 1938, No. 1363); Indian Independence Act, 1947, Sect. 18. In view of the Burma Independence Act, 1947, s. 5(4) it is believed that, as from 4th January, 1948, the Act of 1933 does not apply to Burma.

The Court of Cassation ;
 All Courts of Appeal ;
 All Tribunals of First Instance ;
 All Tribunals of Commerce.

Any judgment of any of these courts—other than a judgment given on appeal from a court which is not a superior court—is registrable if :¹

- (a) it is final and conclusive as between the parties thereto ; *and*
- (b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty ; *and*
- (c) it is given after the coming into operation of the Order in Council directing that . . . the Act shall extend to that foreign country.

The fact that an appeal is pending or possible against the foreign judgment does not impair its registrability.² Application for registration must be made within six years from the date of the judgment.³ No registration is admitted if the judgment is satisfied or could not be enforced in the country of the original court.⁴ A judgment creditor can claim, as a matter of right, the registration of a judgment satisfying the prescribed conditions, and, as Professor Cheshire rightly observes,⁵ it is "an innovation of outstanding importance" that the judgment creditor has no option but to institute registration proceedings. The foreign judgment is, however, recognised without registration for the purposes of defence and counter-claim.⁶ Unlike the Acts of 1868 and 1920, the Foreign Judgments (Reciprocal Enforcement) Act, 1933, does not contain a provision limiting the effect of registration of a foreign judgment to the execution of that judgment only. Consequently, it is possible to institute not only execution in the strict sense or equitable execution but also bankruptcy proceedings on the basis of a judgment registered under the Act of 1933.⁷ The practice as regards applications to register (and to set aside the registration of) a foreign judgment is laid down in Order 41B of the Rules of the Supreme Court, 1883.⁸ Every Order giving leave to register a judgment must state the period within which an application

¹ S. 1 (2).

² S. 1 (3). The regulation under the Act of 1933 differs, in this respect, from that provided by the Act of 1920, see p. 441, *ante*.

³ Or the date of the last appeal judgment given in that case (s. 2 (1)).

⁴ S. 2 (1). ⁵ 3rd ed., at p. 777.

⁶ S. 8.

⁷ *Re a Judgment Debtor* (No. 2176 of 1938) [1939], Ch. 601.

⁸ No security for costs is required for the registration of French and Belgian judgments.

may be made to set aside the registration,¹ and no execution issues on the registered judgment before the expiration of that period.²

Turning now to the second stage of registration proceedings, the Act draws a difference between the cases where the courts *shall* and those where they *may* set aside the registration.³

The registration must be set aside if the Court is satisfied ⁴—

- (i) that the judgment is not a judgment to which the Act applies or was registered in contravention of the provisions of the Act; *or*
- (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; ⁵ *or*
- (iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; *or*
- (iv) that the judgment was obtained by fraud; *or*
- (v) that the enforcement of the judgment would be contrary to public policy in the country of the registering court; *or*
- (vi) that the rights under the judgment are not vested in the person by whom the application for registration was made.

The court is at liberty to set aside the registration if it is satisfied—

- (i) that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter; ⁶ *or*
- (ii) that either an appeal against the judgment is pending or that an appeal is possible and intended.⁷

It is noteworthy that an appeal which is pending or possible does not exclude the registration of the judgment,⁸ but entitles the court in appropriate cases to set aside the registration. Such a measure would, however, not necessarily be permanent. If, for instance, the judgment has been confirmed on appeal, the judgment creditor can obtain a re-registration in England of his judgment.⁹ Further, the English courts, on an application to set aside the registration, are authorised to order that an issue between the parties shall be stated and tried in the ordinary manner.¹⁰

¹ Order 41 B, rule 5 (3).

² Order 41 B, rule 10; for the effect of a registered judgment see s. 2 (2) of the Act. ³ S. 4.

⁴ The following enumeration repeats, in substance, s. 4 (1) (a) and (b) of the Act.

⁵ The circumstances in which the original court is deemed to have jurisdiction are set out in s. 2 (2) and (3).

⁶ S. 4 (1) (b).

⁷ S. 1 (3); see p. 428, *ante*.

⁸ S. 5 (1).

⁹ S. 5 (2).

¹⁰ Order 41 B rule 9 (3).

INDEX

ACCOUNTS :

of rents and profits, 180

ACCUMULATIONS :

Act, 170

rule against, 170, 242

ACCURSIUS, 15

ACTIO PERSONALIS :

and action *in personam*, 380

ACTION :

Admiralty, 399

frivolous, vexatious or oppressive,
400

in personam, 162, 172, 380, 381, 387,
422

in rem, 361, 390, 398, 422, 426

in rem not identical with judgment
in rem, 400

jurisdiction to stay an, 400

ADMINISTRATION (see also SUC- CESSION) :

and location of debts, 206

foreign letters of, 219

jurisdiction to grant letters of, 218

letters of, 218

of estate, 216, 218, 223

testamento annexo, cum, 216, 222

ADMINISTRATOR (see also SUC- CESSION) :

ancillary, 221, 224

principal, 221

ADMIRALTY ACTIONS (see also MARITIME LAW), 156, 163,

166, 399

ADMIRALTY MARSHAL, 399

ADOPTION :

domicil of adopted children, 86

status of adopted child, 272

under the law of California, 285

ADULTEROUS UNION :

legitimation of child born of, 283

AFFREIGHTMENT (see MARITIME LAW)

AGENCY :

contracts of, 111

AGREEMENT :

distinction between contract and, 111
to sell, 182

AIR :

conversion of damages, 369

limitation of liability, 369

AIR—continued

service out of jurisdiction of an
action concerning carriage by,

397

ALIEN ENEMY :

corporation as, 352, 404, 406

counterclaim by, 405

definition of, 405

in general, 404

partnership as, 404

set-off by, 405

Trading with the Enemy Act, 1939,
407

ALIMONY :

foreign judgment ordering perpetual
alimony not recognised in

England, 437

foreign judgments ordering judg-
ment of, 429

of the wife, 332

ALLEGIANCE, 23, 382, 392

AMBASSADORS (see also DIPLO- MATIC AGENTS) :

marriages in Embassies, 306

privilege of, 411, 412

AMERICAN RESTATEMENT, 28

ANNULMENT OF MARRIAGE (see MARRIAGE)

APPEARANCE IN COURT :

to save property, 425

under protest against jurisdiction, 424

APPROBATE AND REPROBATE, TO :

doctrine of Scots Law, 245

ARBITRATION :

clause in contracts, 122

foreign state as party to, 411

ARMED FORCES :

domicil of members of, serving
abroad, 74

jurisdiction over members of Allied
Forces serving in Great Britain, 6

ARREST :

of ship, 399

ASCERTAINMENT :

judicial, of foreign law, 376

ASSIGNMENT :

general, 214

(see also GENERAL ASSIGN-
MENTS)

ASSIGNMENT—continued

- of choses in action, 198
(see also **CHOSSES IN ACTION**)
- on bankruptcy, 251, 256
- on death, 216
- on marriage, 246, 249

ASSUMED JURISDICTION:

- discretion of Practice Master and District Registrar in matters of, 390
- general conditions for exercise of, 390
- of the English Courts, 386, 390

ASSUMPSIT, 418**BALDUS, 15****BANK:**

- nationalisation of Russian banks, 339
- notes, 133

BANKRUPTCY, 251

- assignment on, 256
- debts provable in, 261
- discharge in, 264
 - extra-territorial effect, 265
 - territorial effect, 264
- doctrine of relation back, 260
- jurisdiction:
 - in concurrent bankruptcies, 254
 - of the English Courts, 252
 - of the foreign courts, 253
- trustee in:
 - ancillary, 255, 259-261
 - conflicting claims of English and foreign, 260
 - English, 258, 379
 - foreign, 259
 - principal, 255, 259-261

BANNS AND LICENCES:

- of marriage, 301

BAPTISTS:

- marriage, 304

BAR, VON, 26**BARTOLUS, 15****BASTARD (see ILLEGITIMATE CHILD; LEGITIMACY; INFANT)****BEALE, 3, 9, 27, 30****BERWICK-ON-TWEED, 388****BILL:**

- dissolution of marriage by private, 316
- of exchange (see **NEGOTIABLE INSTRUMENTS**)
- of lading (see under **MARITIME LAW**)

BIRTH:

- proof of, 365-366, 376

BOND:

- money, 199

BOTTOMRY BOND, 126, 399**BOUHIER, 17****BOULLENOIS, 17****BREACH OF CONTRACT (see CONTRACT)****BREACH-DATE RULE, 369****BRETTON WOODS AGREEMENTS; 122, 123****BRUSSELS:**

- Conference on Collisions and Salvage, 1910, 159
- Convention of 1926, 410

BURGUNDUS, 18**CAPACITY:**

- a problem of connection, 46
- of corporation to transact business, 343
- of infants to marry, 302
- of infants to take under a will, 228
- of parties to marry, 300
- status and, 271
- to conclude a contract, 112
- to conclude marriage settlement, 131
- to convey land, 167
- to make a will or take under it, 228, 242

CAPITULATIONS, 83**CARACALLA'S EDICT, 13****CARRIAGE:**

- by air (see **AIR**)
- by sea (see **MARITIME LAW**)

CERTIFICATE:

- Secretary of State, of 404, 411, 413

CHARACTERISATION:

- primary and secondary, 34
- of movables and immovables, 38, 162
- of the personal representative, 222
- of the right, 31, 33, 36, 40

CHARGE:

- equitable, on land, 129
- floating, on land, 178
- on company's assets, 208

CHARITY, 168, 170**CHARTER-PARTY (see MARITIME LAW)****CHATTELS (see MOVABLES)****CHEQUE, 133, 138, 198**

- conversion of, 139

- CHILDREN (see also LEGITIMACY, LEGITIMATION, INFANTS)
 custody of, 332
 maintenance of, 332
- CHOICE OF LAW, 4, 6, 44
 in case of immovables, 164
 clauses in statutes, 45
- CHOSES IN ACTION:
 assignment of, 198
 definition of, 198
 general principles, 198
 goodwill of business, 198, 207
 locality of, 205, 206-210
 patents, 199
 shares in companies, 199, 208
 the principle governing the transfer of, 205
 theories on the transfer of, 201
mobilia sequuntur personam, 201
 theory in favour of law of original contract, 204
 theory of the *lex actus*, 202
 theory of the *lex situs*, 204
 trademarks, 199
- CHOSES IN POSSESSION (see MOVABLES)
- CHRISTIAN MARRIAGE, 36, 291
- CHURCH OF ENGLAND (see also ECCLESIASTICAL LAW)
 Law of, 5
- CLASSIFICATION:
 into immovables and movables, 38, 162
 of negotiable instruments, 132
 of the right, 31, 33, 35, 38
- CLERGY (see also PRIEST)
 privilege of, 21
- CLOG:
 on equity of redemption, 129, 179
- CO-RESPONDENT, 320
- COMITY OF NATIONS:
 Huber's theory, 19
 J. Voet's theory, 8, 18
 recognition of foreign judgments not based on, 416
- COMMITTEE:
 of a person of unsound mind, 273
- COMMON LAW:
 marriage, 6, 302, 303
- COMMORIENTES, 43, 226, 363
- COMMUNAUTÉ DES BIENS, 179, 246
- COMMUNITY OF GOODS, 246
- COMPANY:
 limited (see CORPORATIONS)
 II—(L.67)
- COMPARATIVE LAW, 5, 8
- COMPENSATION:
 and damages in tort, 148
 Workmen's, 150
- COMPETENCE OF THE COURTS (see JURISDICTION)
- COMPUTATION:
 of foreign currency into English currency, 368
- CONCLUSIVENESS:
 of foreign judgment, 430
- CONFIRMATION:
 of a will according to Scots Law, 220, 230
- CONFISCATION:
 of movables, 190
 of property, 55, 378, 379
 of the property of the Russian Banks, 339
- CONFLICT OF LAWS:
 definition of, 4
 history of, 12
 modern theories of, 25
 nature of, 8
 province of, 3
 subject-matter of, 1
- CONJUGAL RIGHTS:
 restitution of (see MATRIMONIAL CAUSES)
- CONNECTION:
 case, 46, 69, 102
 domicile—a problem of, 46, 66
 group, 45
 in the case of contract, 99, 102
 of the right, 7, 31, 44
 stereotyped, 45
- CONSCRIPTION:
 of Netherlands subjects, 6
- CONSIDERATION, 115
- CONSTRUCTION:
 of contracts, 101
 of wills, 234, 242
 rules of, relating to corporations, 345
 (see INTERPRETATION)
- CONTRACT, 4, 98
 abrogation by War, 404
 affreightment of, 126
 assignment of, 198
 bills of exchange, 132
 breach of, 393, 394
 ancillary, 395
 by letter, 395
 place of, 395
 capacity to conclude, 112

CONTRACT—*continued*

- connection of, with a local system of law, 99, 102
- consideration, 115
- debts as choses in action, 199
- distinguished from agreement, 111
- essential validity of, 117
- form of, 112
- illegality of, 122
- intention of the parties, 101
- lex loci contractus*, 99, 119, 124
- lex solutionis*, 118, 122, 119, 123
- letters, by, 118, 395
- maritime, 126
- marriage, 130
- negotiable instruments, 132
- performance of,
 - in foreign currency, 120, 368
 - on gold basis, 121
 - specific, 180
 - within the jurisdiction, 393
- proper law of, 99
- illegality according to proper law, 122
- limitations of the proper law, 108
- multiplicity of the proper law, 106
- presumption :
 - designed to ascertain the proper law, 103, 117
 - in favour of the *lex loci contractus*, 99, 119, 124
 - in favour of the *lex solutionis*, 119, 123
 - in favour of the most effective law, 110, 383
- universality of the proper law, 104
- relating to land, 127, 162, 177
- service, of, 395
- stamp laws, 116

CONTROL :

- of a corporation, 348, 353

CONVENTION :

- Brussels, of, 1926, 410
- Maritime Conventions Act, 1911, 154, 159
- international, 28
 - Belgium, with, 384, 442
 - France, with, 384, 442
- Inter-Scandinavian, of 6th Feb., 1931, 66

CONVERSION :

- equitable, 39
- of a cheque or bill of exchange, 139

CONVERSION—*continued*

- of a foreign claim into English currency, 368

CONVEYANCE :

- Capacity to convey land, 167
- contract to convey land, 127
- essential validity of, 169
- form of, 168
- of land, 127, 167

CORPORATIONS, 42, 384

- as alien enemies, 406
- capacity of, 343
- constitution of, 338
- creation of, 338
- dissolution of, 339
- domicil of, 345
- incorporation creates a status, 334
- internal affairs of, 338
- international, 413
- nationality of, 345
- personal liability of members of, 344
- power of, 342
- recognition of foreign, 334
- residence of, 347
 - alien enemy corporations, 352, 406
 - for purposes of jurisdiction, 350
 - for purposes of taxation, 347
- right to sue and be sued, 344
- voting rights of alien enemy, 404
- winding up of English branch of foreign, 340

CORPUS JURIS, 13, 15

COSTS :

- recovery of, 360
- COUNTERCLAIM, 360
- against a foreign sovereign, 411
 - by alien enemy, 405

COURTS :

- English (see JURISDICTION)
- Foreign (see JURISDICTION)

COUTUMES, 16

CRIMINAL LAW :

- and law of torts, 147, 150
- as a question of fact, 374
- criminal jurisdiction over members of the Allied Forces in Great Britain, 6
- in Admiralty matters, 156
- of the Normans and English, 20
- privilege of Clergy, 21

CURATOR :

- of a person of unsound mind, 273

CURRENCY (see EXCHANGE)

- contracts to be performed in foreign, 120, 368

CURRENCY—*continued*

damages expressed in foreign, 363

CUSTODY :

of children, 88, 332, 286

CUSTOM :

mercantile, 133

CUSTOMS (see REVENUE)

DAMAGES, 360, 380

exemplary, 367

measure of, 367

nominal, 367

remoteness of, 367

substantial, 367

D'ARGENTRÉ, 16, 18

DE PRESENTI :

marriage, 307

DEATH (see also SUCCESSION)

civil, 51, 268

proof of, 365, 376

DECLARATORY JUDGMENTS, 384

DEFAMATION (see LIBEL)

DEFINITION :

alien enemies, 405

bills of exchange, 135

choses in action, 198

conflict of laws, 4

domicil, 68, 89

general assignments, 214

lex actus, 45

lex domicilii, 45

lex fori, 45

lex situs, 45

as governing immovables, 162

as governing movables, 188

matrimonial domicil, 295

movables and immovables, 35, 38, 162

negotiable instruments, 135

proper law of contract, 100

status, 268

vested right, 7, 31, 88

DELIVERY WARRANTS, 197

DICEY, 3, 9, 27, 30

DIPLOMATIC AGENTS :

domicil of, 74

extra-territoriality of foreign, in
English Courts, 411

DISCRIMINATION :

of colour, race, religion, class, caste,

51, 68, 268, 301

DISTRIBUTION :

of estate, 216, 226

DIVORCE :

by administrative authority, 316

Jewish, by means of *ghet*, 320

DIVORCE—*continued*

jurisdiction, 314

competence of courts of matri-

monial domicil, 314

colonial divorce, 318

Indian divorce, 318

Matrimonial Causes Act, 1937, 317

law applicable to, 318

Mohammedan, by means of *Talak*, 320

of war marriages, 317

suits against co-respondents, 320

DOCUMENTS :

of title to goods, 193, 198

DOMICIL, 5, 65

a problem of connection, 46, 66

abandonment of, 75

acquisition of, 75

and nationality, 65, 67

and residence, 67

Anglo-Indian, 83

by operation of law, 69

common—of the parties to an
assignment, 202

considerations of health and choice
of, 80

continuance of, 71

declaration of intention to be
domiciled at a certain place, 80

definition, 68

different kinds, 74

every person must have, 70

influence of compulsion on intention
to acquire, 80

lex fori defines, 73

matrimonial, 85, 249, 295

no person can have more than one, 72

of choice, 69, 75

of corporations, 345

of dependent persons, 70, 84

of deserted wives, 317

of exiles, 82

of fugitives from justice, 81

of married women, 85, 317

of minors, 86

of origin, 69, 74

of persons *in itinere*, 71

of persons of unsound mind, 88

of prisoners, 80

of refugees, 83, 88

principles of the law of, 70, 73

renvoi, 89, 316

retention of, 75

revival of, 71

revocation of will by subsequent
change of, 238

DOMICIL—continued

service of writ out of jurisdiction
on persons domiciled in juris-
diction, 392

DOMINIONS REGISTER :

of British companies, 336

DUMOULIN, 16, 18**DUTCH (see HOLLAND)****DUTCH SCHOOL, 17****ECCLESIASTICAL LAW :**

and the law of contract, 21, 206
jurisdiction of ecclesiastical courts
over a deceased person's mov-
able property, 219

laesio fidei, 21

privilege of clergy, 21

proof of, in Court, 375

ELECTION :

doctrine of, 244, 245

EMANCIPATION :

of infants, 86

ENEMY (see also ALIEN ENEMY)

controlled territory, 405

ENFORCEMENT OF FOREIGN JUDGMENT :

Administration of Justice Act, 1920,
440

direct, 438

Foreign Judgments (Reciprocal En-
forcement) Act, 1933, 441

Judgments Extension Act, 1868, 438

on principle, no direct, 414

**EQUITY (see also UNCONSCION-
ABLE CONDUCT, FRAUD,
etc.):**

equitable charge on land, 178

equitable conversion, 39

equitable execution, 439

equitable interests and continental
jurisprudence, 44

equitable interests and title to
property, 162, 24

equitable jurisdiction *in personam*
and title to land, 165

fiduciary relationship, 174

of redemption, 129, 177

settlements (see SETTLEMENTS)

ESTATE (see SUCCESSION)**ESTOPPEL :**

by record, 432

produced by decree for judicial
separation in subsequent nullity
proceedings, 329

EXCESS PROFIT TAX :

corporations, 347

EXCHANGE (see also CURRENCY) :

bill of, (see NEGOTIABLE IN-
STRUMENTS)

control, 122, 123, 371

rate of, 368

EXECUTION :

equitable, 439

of foreign judgment after registration
in the English jurisdiction, 438

of the Court's judgment, 360

EXECUTOR (see also SUCCESSION) :

de son tort, 223

EXPERT WITNESS, 375**EXTENSION :**

of judgments, 438, 440, 441

EXTRA-TERRITORIALITY :

extra-territorial effect of bank-
ruptcy, 257, 265, 379

of foreign diplomats in Court, 21, 411

of foreign sovereigns in Court, 408

of international organisations, 408, 413

EVIDENCE, 360, 363

Acts, 365

certificate of Secretary of State, 404,
411

evidential character of stamp laws,
116

evidential form, 113, 363

FAMILY PROVISION, 233**FEUDALISM, 14****FIDUCIARY RELATIONSHIP, 174****FINALITY :**

of foreign judgment, 427

FIRMAN :

Turkish, creating a corporation, 339

FLAG :

law of the, 104, 196, 157, 158

FLOATING CHARGE :

on land, 178

**FOREIGN BILL (see NEGOTIABLE
INSTRUMENTS)****FOREIGN CURRENCY :**

contracts to be performed in, 120

FOREIGN FORCES :

stationed in England, 6

**FOREIGN JUDGMENTS (see
JURISDICTION: FOREIGN
COURTS)****FOREIGN LAW :**

judicial ascertainment of, 376

presumption that it is the same as
English law, 374

FOREIGN LAW—*continued*

- proof of, in the English Courts, 373
- where a question of fact, 374
- where judicial notice is taken of, 373

FOREIGN SOVEREIGN (see also SOVEREIGN):

- cannot be sued in England, 408

FORM:

- essential, 112
- evidential, 112, 363
- of contracts, 112
- of conveyances, 168
- of marriages, 301
- of negotiable instruments, 136
- of wills, 228
- under Sale of Goods Act, 1893, s.4, 363
- under Statute of Frauds, s.4, 113, 363

FORUM (see also LEX FORI):

- commune*, 373
- concurus*, 220, 255
- conueniens*, 391

FOUNDLING (see INFANT)

FRANCE:

- coutumes*, 16
- French judgments, enforcement in England, 442
- medieval, 12, 16

FRAUD:

- relating to foreign judgments, 433
- relating to immovables, 179
- relating to movables, 191, 192

FRENCH SCHOOL, 16

FRIVOLOUS LITIGATION, 400

FROLAND, 17

FULL FAITH AND CREDIT CLAUSE:

- of the Constitution of the United States of America, 68, 415

FUNERAL EXPENSES, 217, 223

GAMBLING:

- bills of exchange given for gambling transactions, 436
- valid according to *lex loci contractus*, 125

GARNISHEE PROCEEDINGS, 439

GENERAL ASSIGNMENT:

- definition, 214
- law of, 214
- on bankruptcy, 251
- on death, 216
- on marriage, 246
- lex situs* governing, 160, 214

GERMANY:

- tribal law, 13

GHET, 320

GIFT:

- inter vivos*, 43, 190
- mortis causa*, 43, 190

GLOSSATORS, 15

GOLD CLAUSE, 121

GOODWILL:

- of business, 199, 207

GOVERNMENT:

- international loan, 409
- engaging in commercial activity, 410

GREYNA GREEN MARRIAGE, 307

GROTIUS, 19

GUARDIANS (see INFANTS)

HARDWICKE, LORD, 23

HERITABLE BONDS:

- Scottish, 40

HINDU:

- discrimination on account of caste, 63
- marriage between, and English-woman, 64
- marriage between Hindus, 5, 37, 277, 291, 292

- Law, 5

HISTORY:

- Common and Canon law, 5, 20
- English and Norman law, 5, 20
- of bankruptcy law, 251
- of land law, 22, 161
- of the conflict of laws, 12

HOLLAND:

- conscription of Dutch nationals, 6
- Dutch Forces in England, 6
- Dutch maritime courts, 6
- history of conflict of laws in, 17
- provinces of, 12

HOLOGRAPH (see also SUCCESSION):

- will, 229, 231

HOTCHPOT:

- in case of debts provable in bankruptcy, 263

HUBER, 9, 17, 18, 19, 27

- influence on Story, 24
- theory of the comity of nations, 19
- theory of the vested right, 19

HYPOTHÈQUE:

- on ship, 362
- (see also MORTGAGE)

ICEBERG:

- collision of ship with, 158

ILLEGALITY:

- of contract, 121

ILLEGALITY—*continued*

of marriage, 307

ILLEGITIMATE CHILD (see also LEGITIMACY):

domicil of, 86

IMMOVABLES, 38, 160

and movables, 35, 38, 40, 162

charge on, 178

contracts relating to, 127, 162, 177

fraud relating to, 162, 179

history of the law of, 22, 161

jurisdiction *in personam* concerning, 162, 172

lease of, 167, 169

payment of rent, 178

lex situs:

application to choice of law and jurisdiction, 164

application to succession to immovables, 160, 241

definition of *lex situs*, 162qualifications of *lex situs*, 162

restraints on alienation of, 168, 169, 170

rule against:

accumulations, 170

perpetuities, 170

service out of jurisdiction in actions concerning, 392

succession to, 241

title to, 164, 166, 172, 370

trespass to land, 164

trust relating to, 162, 179

(see also SETTLEMENT)

IMMUNITY:

of sovereigns from process in Court, 408 (see also PRIVILEGE)

IMPEACHMENT:

of foreign judgment on merits, 430

INCOME TAX:

corporations, 337, 346, 347

INDIA:

divorce, 318

INFANT:

adulterous union, born of, 283

capacity to:

conclude contract, 112

conclude marriage settlement, 131

marry, 302

take under a will, 228

domicil of, 86

adopted, 86

children in case of re-marriage of

parent, 87

foundling, 89

INFANT—*continued*

illegitimate, 86

legitimate, 86

legitimated, 86, 88

orphan, 88

posthumous, 86

refugee children, 88, 288

emancipation of, 86

under guardianship, 286

jurisdiction over the person of infants, 287

jurisdiction over the property of infants, 289

the paramount principle, 286

IN ITINERE:

domicil of persons, 71

INJUNCTION:

and service out of jurisdiction, 396

to stay foreign proceedings, 401

INLAND BILL (see NEGOTIABLE INSTRUMENTS)

INSULT:

verbal, and libel, 145, 154

INSURANCE, 212, 395

INTER-SE RELATIONSHIP:

as regards choses in action, 210

as regards tangible movables, 191, 248

INTERNATIONAL CONVENTIONS,

28, 311

INTERNATIONAL COURT OF JUSTICE, 408, 413

INTERNATIONAL LAW:

private, 2

public, 2, 404

INTERNATIONAL ORGANISATIONS, 408, 413

INTERNATIONAL SCHOOL, 4, 8, 25, 28

INTERPRETATION:

of foreign statutes by the English Courts, 376

INTESTACY (see SUCCESSION)

INVOICE, 395

ITALY:

city states of medieval, 12

Italian nationalism, 27

Italian Statutists, 14

Mancini, 27

Risorgimento, 27

JACTITATION OF MARRIAGE, 311

JEWISH:

divorce by means of a *Ghet*, 320

marriage, 292

JITTA, 26

JOINDER :

of defendants and service out of jurisdiction, 396

of partners of a partnership, 361, **398**

of plaintiffs or defendants, 360

JUDGMENT-DATE RULE, 369

JUDGMENTS (see JURISDICTION)

JUDICIAL PROCESS :

observance of, 419

JUDICIAL SEPARATION (see MATRIMONIAL CAUSES)

JURISDICTION :

declaratory judgments, 384

in bankruptcy proceedings, 252

in divorce proceedings, 314

in petitions for :

annulment of marriage, 320, 324

divorce, 314

judicial separation, 329

restitution of conjugal rights, 331

judgments savouring of *res* in

matrimonial causes, **312**, 381, 398

jurisdiction of the English Courts, 378

assumed jurisdiction, 390

(see also ASSUMED JURISDICTION)

in personam over immovables, 173

in probate matters, 218

nature of, 386

extritoriality of foreign sovereigns and diplomats, 408

in personam, 378, 381, 385, **387**

in case of immovables, 162, **172**

principle of effectiveness, 383

principle of presence, 382, **387**

principle of submission, 382, **389**

in rem, 382, **387**

Admiralty actions, 156, 163, 362, **399**

concerning dissolution of marriage, **312**, 381, 398

concerning immovables, 164

original jurisdiction, 387

based on the principle of presence, 382, **387**¹

based on the principle of submission, 382, **389**

in personam over immovables, 173

in probate matters, 218

personal exemptions from the jurisdiction, 404

JURISDICTION—*continued*

jurisdiction of the English Courts :

persons who cannot be sued, 408

foreign sovereigns, 408

foreign diplomatic agents, 411

foreign representatives of international organisations, 413

persons who cannot sue (alien enemies), 404

proceedings in court, 355, **380**

proof of foreign law in the English courts, 373

territorial limits of the jurisdiction, 378, 388

jurisdiction of the foreign Courts, 62, **414**

appearances under protest against foreign jurisdiction, 424

competence, 421

foreign judgment :

conclusiveness of, 430

direct enforcement of, 9, 414, 438

foreign judgment :

finality of, 427

for alimony, 429

for a sum certain in money, 428

no merger of, 414

obtained by fraud, 433

recognition of, 9, 414, **419**

violating English *lex fori*, 437

in personam, 422

in rem, 312, 422, **428**

international jurisdiction, 379, 386, **421**

over their own nationals, 387

proceedings in court, 356, **380**

res judicata, 427

of the courts to adjudicate upon conflictual issues, 6

of the legislative, judicial or executive type, 378

over immovables, 164

probate or letters of administration, to grant, 218

registration of foreign judgments in England, 438

residence of a corporation for purposes of, 350

sovereignty and the territorial principle, 378

stay proceedings, to, 400

JURISPRUDENCE CONSTANTE, 97

JUSTINIAN'S CODE, 13, 15, 26

KENYON, LORD, 23

LAESIO FIDEI, 21

LAND LAW (see IMMOVABLES)

LAW OF THE FLAG, 104, 126, 157, 158

LAW REVISION:

and interest on debts and damages, 367

and Sale of Goods Act, 1893, 365

and Statute of Frauds, 365

LAWFUL WEDLOCK, 274, 282

LEASE, 167, 169, 199

payment of rent, 178

LEGALISATION:

of torts, 153, 154

LEGITIMACY, 5, 273

children of polygamous marriages, 277

children of putative marriages, 278

domicil of illegitimate children, 86

Legitimacy Act, 1926, 283

legitimation (see LEGITIMATION)

theories on:

lawful wedlock theory, 274

status theory, 275

LEGITIMATIO:

per rescriptum principis, 280, 285

per subsequens matrimonium, 280

LEGITIMATION:

by act of state, 285

by subsequent marriage, 280

domicil of legitimated children, 86, 88

Legitimacy Act, 1926, 283

legitimacy (see LEGITIMACY)

LEX ACTUS:

definition, 45

concerning choses in action, 202

concerning movables, 184

LEX CAUSAE, 33, 356

LEX CELEBRATIONIS:

of marriage, 24, 36

LEX DOMICILII: definition, 45, 68

LEX FORI:

and equitable jurisdiction over

foreign land, 179

and the law of procedure, 355

and the law of torts, 146

defines domicil, 73

definition, 45

English, and foreign judgments, 437

illegality of contract according to, 125

public policy of, 29, 50

LEX LOCI CONTRACTUS, 119, 124

LEX LOCI DELICTI:

concerning torts, 144, 149

LEX SOLUTIONIS:

concerning contracts, 119, 123

LEX SITUS:

as applicable to:

choses in action, 204, 205

contracts relating to land, 128

general assignments, 160, 215

immovables, 160

movables, 187, 188

succession to immovables, 241

definition, 45

doctrine of the vested right and, 161

territorial principle and, 160

LIABILITY:

personal, of members of a corpora-

tion, 344

LIBEL:

and verbal insult, 144, 154

defence of privilege, 154

service out of jurisdiction in case of

an action for, 396

LICENCE:

marriage, 301

LIEN:

maritime, 363, 399

LIMITATION:

of actions, 171, 359, 360, 370

of claims against a diplomatic agent,

413

of claim based on foreign judgment,

419

of claims in the administration of

the estate of a deceased person,

225

LITIGATION:

vexatious, oppressive and frivolous,

400

LOAN:

containing a gold clause, 121

international government, 409

LOCALITY (see also LEX SITUS:

SEAT):

of a debt, 206

LORD KINGSDOWN'S ACT, 39, 51,

229, 230, 233, 239

LUNATICS (see also UNSOUND

MIND):

domicil of, 88

MAILBOAT, 409

MAINTENANCE:

of children, 332

of wife, 332

MANCINI, 27

MANSFIELD, LORD, 23

MARITAL RÉGIME:

de la communauté des biens, 246

MARITAL RÉGIME—continued

- de l'union des biens*, 247
- de l'unité des biens*, 246
- de la séparation des biens*, 287
- of community of goods, 246
- of separation of goods, 247

MARITIME LAW:

- Admiralty actions, 22, 163, 393
- bill of lading, 127, 193, **196**, 198, 395
- bottomry bond, 127, 399
- charterparty, 127, 431
- contract of affreightment, 126, 127
- law of the flag, 104, **126**, 157, 158
- maritime contracts, 126
- Maritime Conventions Act, 1911, 155, **159**
- maritime lien, 362, **399**
- maritime torts, **155**, 399
- marriage on the high seas, **306**, 365
- merchant shipping, 345, 409
- necessaries men, 362, **399**
- proceedings *in rem* against ship, cargo and freight, 361, **399**
- respondentia*, 399
- sale of ship by order of court, 361, **399**
- shipping documents, 395
- three mile limit, 399

MARRIAGE, 24, 35, 130, 246, **291**

- agreement of, 293
- annulment of, 321
 - void, 324
 - voidable, 322
- assignment on, 246, **249**
- banns and licences, 301
- between:
 - Hindu and English woman, 64
 - Hindus, 5, 37, 277, **292**
 - Mohammedan and English woman, **292**, 320
 - Mohammedans, 6, 277, **292**, 320
- capacity of parties to marry, 300
- Christian, 36, **291**, 319
- Common Law, 6, **303**
- conclusion of, 297
- contracts, 130, **247**
- de presenti*, 307
- dissolution of, 311
- divorce (see **DIVORCE**)
- essentials of, 36, 291, 299, **306**
- formalities of, 299, **301**
- Foreign Marriage Acts, 1892-1947, 51, **305**
- Gretna Green, 307
- in Embassies, 306

MARRIAGE—continued

- jactitation of, 311
 - Japanese, 37, 292
 - Jewish, 291
 - judicial separation (see **MATRIMONIAL CAUSES**)
 - legitimation by subsequent, 280
 - matrimonial causes (see **MATRIMONIAL CAUSES**)
 - matrimonial domicile (see **MATRIMONIAL DOMICIL**)
 - monogamous, 35, 291
 - Mormon, 36
 - on the high seas, 306, 365
 - polygamous, 35, 277, 291, **292**, 320
 - proof of, **365**, 376
 - proxy, by, 302
 - putative, 278
 - re-marriage of parent and domicile of children, 87
 - restitution of conjugal rights (see **MATRIMONIAL CAUSES**)
 - revocation of will by subsequent, 240
 - Roman Catholic, 279, 315, 319
 - royal, 307
 - settlements, 130, 247
 - status of, 268, 291, **293**
 - validity of:
 - celebrated in England, 308
 - celebrated outside England, 298
- MARRIED WOMAN:**
- domicil of, 85
 - matrimonial domicile (see **MATRIMONIAL DOMICIL**)
 - emancipation of, 246
 - property of, 246
- MATRIMONIAL CAUSES:**
- ancillary relief, 332
 - annulment of marriage, 321
 - divorce, 313
 - in general, 311
 - jactitation of marriage, 311
 - judgments savouring of *res*, 312
 - judicial separation, 85, 329
 - restitution of conjugal rights, 331
- MATRIMONIAL DOMICIL**, 85, 249, **295**
- and marriage settlements, 130
 - definition of, 295
 - jurisdiction of courts of:
 - in divorce petitions, 314
 - in petitions for annulment of marriage, **321**, 323, 324
 - in petitions for judicial separation, 329

MATRIMONIAL DOMICIL—contd.

- jurisdiction of courts of:
 - in petitions for restitution of conjugal rights, 331

MERCANTILE CUSTOM, 133, 367**MERCANTILE LAW:**

- bills of exchange, 132
- contracts of agency, 111
- corporations, 384
- history of, 21
- insurance, 212
- law of contract, 98
- maritime contracts, 126 (see also **MARITIME LAW**)
- merchant shipping, 345
- negotiable instruments, 132
- partnerships, 42, 335, 360, 398

MERGER:

- of foreign judgment, 414

MERITS:

- impeachment of foreign judgment on, 430

MINING CONCESSION, 42**MINORS, 273-90 (see also INFANTS)****MOBILIA SEQUUNTUR PERSONAM:**

- history of rule, 24
- relating to intangible movables, 201
- relating to tangible movables, 183

MOHAMMEDAN:

- devolution of property to the *Bait-al-mâl*, 227
- divorce by *Talak*, 320
- Law, 6
- legitimacy of children of a polygamous Mohammedan marriage, 277

marriage:

- between Mohammedans, 6
- to Englishwoman, 292, 320

MONEY (see also CURRENCY):

- bond, 199

MONOGAMOUS MARRIAGES, 35, 291**MORMON MARRIAGE, 36****MORTGAGE:**

- capacity to, land, 167
- contract to, land, 127
- equity of redemption, 129, 177
- form of, 168
- securing personal debt, 41
- ship, on, 362, 399
- title of mortgagee, 195

MORTMAIN ACTS, 171, 242, 343**MOVABLES:**

- derived title, 194
- documents of title to, 196
- immovables, in relation to, 35, 38, 40, 162
- intangible (see under **CHoses IN ACTION**)
- inter se* relationship between transferor and transferee, 191
- law of, 181
- mortgagee's title, 195
- principle governing the transfer of, 188
- res in transitu*, 193
- succession to, 226
- transfer of, principle governing: 188
 - English doctrine, 188
 - mobilia sequuntur personam*, 183
 - theory of *lex actus*, 184
 - theory of *lex situs*, 187, 188
- unconscionable conduct, 191, 192

NATIONALISATION:

- property, of, 59, 191, 379
- Russian banks, of, 339
- Russian shipping, of, 410
- U.S.A. shipping, of, 410

NATIONALITY:

- alien enemy, irrelevant for definition of, 405
- allegiance and, 23, 29, 382
- corporations, of, 345
- domicil and, 65, 67
- jurisdiction of foreign courts over nationals living in England, 386-7

law of, 5

- legitimated persons, of, 284
- status of, 268

NATURAL JUSTICE, 419**NECESSARIES MEN:**

- of a ship, 362, 399

NEGOTIABLE INSTRUMENTS, 132, 185, 197, 436

- Bills of Exchange Act, 1882, 133, 134

classification, 132

- documents of title to goods, 196
- essential validity of, 137
- form of, 137
- performance, 140

NEO-STATUTISTS, 17, 28, 29, 66**NORMAN LAW, 5, 20****NORWAY:**

- Forces in England, 6

NOTICE OF DISHONOUR, 142 (and see NEGOTIABLE INSTRUMENTS)

NOTTINGHAM, LORD, 23

NOVUS ACTUS INTERVENIENS, 367

NULLITY OF MARRIAGE (see MARRIAGE, ANNULMENT OF)

OPPRESSIVE LITIGATION, 400

ORDAINED PRIEST (see PRIEST)

ORDRE PUBLIC, 29, 50

ORIGINAL JURISDICTION :

based on presence, 382, 387

based on submission, 382, 389

ORPHAN (see INFANTS)

PARLIAMENT OF MERTON, 281,

PARTNERSHIP, 42, 335, 360, 398

alien enemy, 404, 405

service of writ out of jurisdiction on, 398

suit against foreign, 360

PATENT, LETTERS, 199, 376

PENAL LAW :

foreign, 54, 437

PERFORMANCE :

contracts, of :

foreign currency, in, 120, 122, 368, 371

gold basis, on, 121

within jurisdiction, 394

specific, 180

PERPETUITIES :

rule against, 170, 242

PERSONAL LAW :

different systems of, 5, 6, 208

infants under guardianship, of, 286

status and, 272

PERSONALTY :

and realty, 35, 38, 40

PHILLIMORE, 26

PILLET, 27

PILOTAGE, 399

PLEADINGS :

vexatious, frivolous and oppressive, 400

POLITICAL RIGHTS :

foreign, 52

POLYGAMOUS MARRIAGES, 35,

37, 291, 292

children of, 277

PORTION :

legal :

of descendants, 233, 234

of wife, 250

POSTGLOSSATORS, 15

POWER OF APPOINTMENT :

exercise of, by will, 233, 236

general, 236

special, 236

POWERS OF CORPORATION, 342

PRAETOR :

peregrinus, 13

urbanus, 12

PRESCRIPTION :

of title, 358, 370

to immovables, 171

PRESIDENT :

of a state, 408

PRESUMPTION OF DEATH, 221,

226, 363

PRIEST :

presence at marriage ceremony, 302,

304, 305

PRIORITY :

of assignees of debt, 203

of creditors :

in bankruptcy, 261

in distribution by the Court, 360,

361, 399

PRISONER OF WAR :

not alien enemy, 405, 407

PRIVILEGE :

of clergy, 21

of diplomatic agents, 411

of international organisations, 408,

413

of Sovereigns, 408

PROBATE (see SUCCESSION) :

foreign grants of, 219

jurisdiction to grant, 218

location of debts, in relation to, 206

PROCEDURE, 355

damages, 366

evidence, 363

exchange control restrictions, and,

371

judicial ascertainment of foreign law,

376

lex fori and, 355

limitation of actions, 370

matters pertaining to, 358

presumption of death, 221, 226, 363

priority of creditors, 361

proceedings in court, 356

proof of foreign law, 373

PROCEDURE—*continued*

- right and remedy, 360
- Sale of Goods Act, 1893, s.4, 363
- security for costs, 441
- Statute of Frauds, s.4, 363
- where British Courts take cognisance of foreign law, 373

PROCEEDINGS *IN REM*, 361 (see also ACTION; JURISDICTION)
not identical with judgments *in rem*, 399

PRODIGALITY:

- status of, 268

PROFIT:

- accounts of, 180

PROFIT *A PRENDRE*, 168

PROMISSORY NOTES, 133

PROOF:

- of debt in bankruptcy (see BANKRUPTCY)
 - of foreign law (see FOREIGN LAW)
- PROPER LAW OF CONTRACT (see CONTRACT)

PROTEST:

- of bill of exchange, 136 (see also NEGOTIABLE INSTRUMENTS)

PUBLIC POLICY, 29, 32, 50, 60

PUTATIVE MARRIAGES:

- children of, 278

QUAKERS:

- marriage of, 291

QUALIFICATION, 31

QUASI-CONTRACT, 43, 418

RATIFICATION OF TORTS, 153, 154

REALTY: and personality, 35, 38, 40

RECEIVER:

- equitable execution of judgment by way of appointment of, 439
- of a person of unsound mind, 273

RECOGNITION:

- of foreign government:
 - de facto*, 57, 59, 338
 - de jure*, 59, 338
- of foreign judgments, 414, 419

RECOURSE:

- heir's right of, 244
- in case of bill of exchange, 135, 142

REFUGEE:

- children, 88, 288
- domicil of, 82, 83
- from Germany, 83, 268

REFUGEE—*continued*

- Refugees Committee, 413
- status of, 268

REGISTRATION:

- of Scottish and Northern Irish judgments, 438

RELATION BACK:

- bankruptcy, 260, 261

RELIGIOUS LAWS, 5

- proof of, in the English Courts, 375

REIMATE JUDGMENT, 428

REMEDY (see PROCEDURE)

RENT:

- accounts of, 180
- payment of, 178
- (see also LEASE)

RENVOI, 89, 316

- critical review of, 96
- in American law, 92
- in English law, 90
- where doctrine breaks down, 95

REQUISITION:

- of movables, 190
- of property, 59
- of Russian Banks, 339

RES *IN TRANSITU*, 181, 193

RES JUDICATA, 427

RE-SEALING:

- of foreign grants of administration, 220
- of foreign judgments, 438

RESIDENCE:

- and domicil, 67
- jurisdiction of courts of:
 - divorce petitions, in, 314
 - petitions for annulment of marriage, in, 322, 326
 - petitions for judicial separation, in, 329
 - petitions for restitution of conjugal rights, in, 332
- of corporations, 347
- service out of the jurisdiction on persons ordinarily resident within the jurisdiction, 392
- voluntary, as test of an alien enemy, 405

RESPONDENTIA, 399

RESTATMENT:

- American, of the Law of Conflict of Laws, 28

RESTITUTION:

- of conjugal rights (see MATRIMONIAL CAUSES)

RESTRAINT :

- on alienation :
 - of land, 168, 169
 - of property on death, 232, 242

REVENUE LAW :

- foreign, 53, 123, 437

REVOCACTION OF A WILL :

- by operation of law, 238
- by subsequent change of domicil, 338
- by subsequent marriage, 240

RIGHT AND REMEDY (see PROCEDURE)

RODENBURG, 18

ROMAN CATHOLIC :

- bishop as expert witness, 375
- canon law, 5, 20
- Church, law of, 5
- common law marriage, and, 304
- marriage, 278, 315, 319
- priest consecrating Protestant marriage, 302, 304

ROMAN LAW, 12

ROYAL MARRIAGE, 307

SALE :

- and agreement to sell, 181
- of property under judgments *in personam* and *in rem*, 381
- of ship, cargo and freight by order of the Court, 361

SAVIGNY, VON, 26, 44

SCANDINAVIAN CONVENTION, 66

SCOTTISH LAW :

- approve and reprobate, 245
- ascertainment of, 373
 - Calvin's case*, 22
- children of putative marriages in, 278
- confirmations, 220, 230
- extension of Scottish judgments, 438
- history of the conflict of English and, 22
- history of Scottish company law, 42
- jurisdiction *in personam* of the English courts does not extend to Scotland, 388
- re-sealing of Scottish confirmations, 220
- remitter to Scottish Courts, 376, 377
- Scottish delivery notes, 197
- Scottish heritable bonds, 40
- Scottish legitimization by subsequent marriage, 72, 280
- Scottish marriage *de presenti*, 302, 307

SCOTTISH LAW—continued

- service out of jurisdiction on Scottish defendants, 393

- Union with Scotland, 22

SEAT :

- of legal relationship, 32, 44
- of obligation, 99, 204, 205, 206

SECRETARY OF STATE :

- certificate of, 404, 411, 413

SEPARATION :

- judicial (see MATRIMONIAL CAUSES)

SÉPARATION DES BIENS, 246

SERVICE :

- of the Writ (see WRIT; JURISDICTION)
- out of the Jurisdiction (see JURISDICTION; ASSUMED JURISDICTION)

SET-OFF, 360

- by alien enemy, 405

SETTLEMENT :

- marriage, 130, 246
- marriage in case of divorce, 332

SHARES :

- in companies, 199
 - (see also CORPORATIONS)
- locality of, 208

SHIPPING DOCUMENTS, 395

SIÈGE SOCIAL :

- of a corporation, 353

SIGHT DRAFT, 141

- (see also NEGOTIABLE INSTRUMENTS)

SLAVES :

- discrimination on account of slavery, 51, 68
- in Brazil, 63
- in Jamaica, 42
- in U.S., 42

SMUGGLING, 123

SOVEREIGN (see also FOREIGN SOVEREIGN) :

- as fountain of justice, 4
- as *pater patriae* assumes guardianship over children, 286
- engaging in commercial activity, 410
- extra-territoriality of foreign, in the English courts, 408
- jurisdiction and the territorial principle, 378
- principle of territorial sovereignty, 4
- private property of, 55

SPECIALTY :

- deed, 199

STAMP LAWS, 116, 136

STATE :

legitimation by act of, 285
(see also SOVEREIGN)
sovereign, 2

STATUS :

and capacity, 271
and the personal law, 272
civil, 65, 268, 284
definition, 268
of alien enemy, 268
of a person, 5, 7, 47, 268
of a political refugee, 268
of corporation, 334
of infants under guardianship (see INFANTS)
of legitimacy (see LEGITIMACY)
of legitimation (see LEGITIMATION)
of marriage, 291, 298
of nationality, 268
political, 65, 268, 284
recognition of foreign, 269

STATUTISTS :

attacked by J. Voet, 18
Bartolus, 14
Italian, 14, 19
Neo-Statutists, 19, 26, 29

STAY OF ACTIONS :

in the English courts, 400

STORY, 3, 8, 24

STOWELL, LORD, 23

SUCCESSION :

administration of estate, 216, 218, 223
distribution of estate, 216, 226
doctrine of approbate and reprobate, 245
doctrine of election, 244
foreign grants, 219
heir's right of recourse, 244
intestate, 227, 241
jurisdiction to grant letters of administration, 218
jurisdiction to grant probate, 218
personal representatives, 220 *et seq.*
to immovables, 241
to movables, 226
will, under a, 227, 241, 242
capacity to make a will or to take under it, 228
construction of the will, 234, 242
essential validity of the will, 232
formal validity of the will, 228
Lord Kingsdown's Act, 230, 239
power of appointment, 236

SUCCESSION—*continued*

will, under a, restraints on testamentary dispositions, 234
revocation of will, 238

TALAK, 320

TAXATION :

and location of debts, 206
foreign revenue laws, 53, 123, 437
of corporations, 346, 347

TERRITORIAL LIMITS :

of English jurisdiction, 387
of jurisdiction, 56, 378

TERRITORIAL PRINCIPLE :

and *lex situs*, 161
sovereignty and jurisdiction, 378

TERRITORIAL SCHOOL, 4, 25, 27, 30

of feudalism, 14

TERRITORIAL WATERS, 156, 399

TESTAMENTSVOLLSTRECKER, 222

THELLUSON ACT, 170, 233

THREE MILE LIMIT, 399

TITLE OF HONOUR :

legitimated person excluded from, 281, 283

TITLE TO PROPERTY :

documents of, 196
mortgagee's, 195
to choses in action, 198
to immovables, 24, 162
to movables, 181, 194
the absolute, 381
the derived, 194, 381
the mortgagee's, 195

TORTS, 62, 144

actionability of, 153

justifiability of, 149

legalisation of, 153, 154

maritime, 155

no liability for, 149, 153

theories on, 144

English theory, 147

lex fori theory, 146

lex loci theory, 144

obligation theory, 145

valid legal defence, 150, 154

TOWAGE, 399

TRADE MARKS, 199, 376

TRESPASS :

to land, action for and title to the land, 164

TRUST :

and continental jurisprudence, 44
for sale, 39

TRUST—*continued*

relating to immovables, 162, 179

TRUSTEE—in Bankruptcy (see
BANKRUPTCY)

UNCONSCIONABLE CONDUCT,

173, 174, 179, 192

UNION DES BIENS, 246

UNIT :

legal, 1, 3, 5

political, 1, 2

UNITÉ DES BIENS, 246

UNITED NATIONS, 408, 413

UNITED NATIONS RELIEF AND
REHABILITATION, ADMINIS-
TRATION 413

UNITED STATES OF AMERICA :
full Faith and Credit Clause of the
Constitution of, 63, 415

restatement of Law, 28

state-owned merchant ships, 410

states of the, 5, 12

forces of, in England, 6

UNJUSTIFIABLE ENRICHMENT,
43

UNSOUND MIND :

domicil of persons of, 88

property of persons of, 273

status of persons of, 268, 273

VALIDITY :

of contract, 117

of conveyance, 169

of marriage :

celebrated in England, 308

celebrated outside England, 298

of negotiable instruments, 137

of will, 228, 232, 238, 242

essential, 232

formal, 228

VECCHIO, DEL, 26

VERWEISUNG, 91

VESTED RIGHT, 9, 30, 31
and foreign judgment, 417
connection of the right, 44

VESTED RIGHT—*continued*

definition of the right, 33

enforcement of, 355

exceptions to the rule of the pro-
tection of, 49

Huber's theory, 19

presumption of protection of, in
Court, 49

the *lex situs* and the principle of the,
161

VEXATIOUS LITIGATION, 400

VOET :

John, 8, 18, 25, 27

Paul, 18

WARDS (see INFANTS)

WARSHIP, 409

WEISS, 27

WESTLAKE, 26

WHARTON, 26

WIFE (see also MARRIED WOMAN ;
MARRIAGE ; MATRIMONIAL
DOMICIL) :

maintenance of, 332

married women's property, 246

WILL (see SUCCESSION)

WINDING UP :

of corporations, 339

WORKMEN'S COMPENSATION,
150

WRIT :

issue of, 388

of *elegit*, 439

of execution, 439

of *fi. fa.*, 439

in *rem* against ship, cargo and
freight, 399

service of, 388

out of jurisdiction, 388, 390, 392

(see also ASSUMED JURIS-
DICTION ; JURISDIC-
TION)

substituted service, 388

ZITELMANN, 26

**PRESIDENT'S SECRETARIAT
LIBRARY.**

Accn. No......**124**.....

1. Books may be retained for a period not exceeding fifteen days.